No. 06-278
Title: Deborah Morse, et al., Petitioners
v.
Joseph Frederick
Docketed: August 29, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-35701)
Decision Date: March 10, 2006
Rehearing Denied: April 18, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 27 2006	Application (06A30) to extend the time to file a petition for a writ of certiorari from July 17, 2006 to September 15, 2006, submitted to Justice Kennedy.
Jul 12 2006	Application (06A30) granted by Justice Kennedy extending the time to file until August 28, 2006.
Aug 28 2006	Petition for a writ of certiorari filed. (Response due September 28, 2006)
Sep 27 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Sep 27 2006	Brief of respondent Joseph Frederick in opposition filed.
Sep 27 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent Joseph Frederick.
Sep 28 2006	Brief amici curiae of D.A.R.E. America, et al. filed.
Sep 28 2006	Brief amici curiae of National School Boards Association, et al. filed. (Distributed)
Oct 9 2006	Reply of petitioners Deborah Morse, et al. filed.
Oct 11 2006	DISTRIBUTED for Conference of October 27, 2006.
Oct 30 2006	DISTRIBUTED for Conference of November 3, 2006.
Nov 6 2006	DISTRIBUTED for Conference of November 9, 2006.
Nov 17 2006	DISTRIBUTED for Conference of November 21, 2006.
Nov 27 2006	DISTRIBUTED for Conference of December 1, 2006.
Dec 1 2006	Motion for leave to file amicus brief filed by National School Boards Association, et al. GRANTED.
Dec 1 2006	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, January 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 2, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, February 16, 2007.
Dec 8 2006	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for the petitioners.
Dec 18 2006	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including January 16, 2006.
Dec 18 2006	Extension of time within which to file respondent's brief on the merits to and including February 20, 2007.
Jan 16 2007	Joint appendix filed.
Jan 16 2007	Brief of petitioner Deborah Morse, et al. filed.

Jan 16 2007	Brief amicus curiae of United States filed.
Jan 16 2007	Brief amici curiae of D.A.R.E. America, et al. filed.
Jan 16 2007	Brief amici curiae of National School Boards Association, et al. filed.
Jan 17 2007	SET FOR ARGUMENT ON Monday, March 19, 2007.
Jan 23 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 31 2007	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Feb 5 2007	CIRCULATED.
Feb 15 2007	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Feb 19 2007	Brief amicus curiae of Liberty Counsel filed. (Distributed)
Feb 20 2007	Brief amicus curiae of Alliance Defense Fund filed. (Distributed)
Feb 20 2007	Brief amici curiae of Student Press Law Center, et al. filed. (Distributed)
Feb 20 2007	Brief amicus curiae of Liberty Legal Institute filed. (Distributed)
Feb 20 2007	Brief amicus curiae of Students for Sensible Drug Policy filed. (Distributed)
Feb 20 2007	Brief amicus curiae of Christian Legal Society filed. (Distributed)
Feb 20 2007	Brief amici curiae of National Coalition Against Censorship, et al. filed. (Distributed)
Feb 20 2007	Brief amicus curiae of American Center for Law and Justice filed. (Distributed)
Feb 20 2007	Brief of respondent Joseph Frederick filed. (Distributed)
Feb 20 2007	Brief amici curiae of Drug Policy Alliance, et al. filed. (Distributed)
Feb 20 2007	Brief amicus curiae of Lambda Legal Defense and Education Fund, Inc. filed. (Distributed)
Feb 20 2007	Brief amicus curiae of Center for Individual Rights filed. (Distributed)
Mar 5 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 5 2007	Record received from U.S.D.C. of Alaska. (1 envelope)
Mar 12 2007	Reply of petitioners Deborah Morse, et al. filed. (Distributed)
Mar 19 2007	ARGUED. For petitioners: Kenneth W. Starr, Los Angeles, California (20 minutes); and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. (10 minutes - for United States, as amicus curiae, supporting petitioners.) For respondent: Douglas K. Mertz, Juneau, Alaska (30 minutes

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JUNEAU SCHOOL BOARD; DEBORAH MORSE,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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INTRODUCTION

In a case that has drawn the attention — and triggered the deep concern — of school boards and administrators nationwide, the Ninth Circuit has profoundly upset settled understandings of First Amendment and qualified immunity principles. The decision below subjects a public high school principal to personal liability for disciplining a student who displayed a banner expressing positive sentiments about illegal drug use at a school-sponsored and faculty-supervised event taking place on and adjacent to school grounds during school hours. Principal Deborah Morse was enforcing a school policy against displaying messages that promote illegal substances — a policy that is common in schools across the nation. For that entirely appropriate action, she faces the potential for ruinous liability.

School officials are now faced with a confusing, if not alarming, message. They are responsible for teaching students about the dangers of illegal drugs. But they also must tolerate pro-drug messages in the face of threats of draconian civil damages lawsuits. This is wildly wrong. And this Court should say so.

Not since *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), has the Court had occasion to provide guidance to public schools — and to parents and students — with respect to the delicate balance between students' constitutional rights, on the one hand, and the solemn duty of school administrators, on the other, to maintain order and instill fundamental values in the challenging context of public education. In light of the Ninth Circuit's double-barreled, destabilizing decision in this vital arena of our national life, this Court's authoritative guidance is badly needed.

OPINIONS BELOW

The orders and judgment of the United States District Court for the District of Alaska (per Sedwick, C.J.) granting

petitioners' summary judgment motion are reprinted at App. 23a-44a and are not otherwise published. The Ninth Circuit's decision (per Kleinfeld, J., joined by Hall and Wardlaw, JJ.) reversing the district court is reprinted at App. 1a-22a and is published at 439 F.3d 1114. The court of appeals' order denying rehearing and rehearing en banc is reprinted at App. 45a-46a and is not otherwise published.

JURISDICTION

The Ninth Circuit rendered its decision on March 10, 2006, and denied rehearing and rehearing en banc on April 18, 2006. Justice Kennedy subsequently extended the time to file this petition for a writ of certiorari to and including August 28, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Title 20, Sections 7101 *et seq.* of the United States Code, codifies the Safe and Drug-Free Schools and Communities Act, pertinent parts of which are reprinted at App. 47a-51a.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

> equity, or other proper proceeding for redress, ...

Juneau School Board Policy 5520, reprinted at App. 53a-54a, states, in pertinent part:

> The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .

Juneau School Board Policy 5721, reprinted at App. 54a-57a, states, in pertinent part:

> The distribution on school premises of the following types of materials is prohibited: materials that . . . advocate the use by minors of any illegal substance or material . . . .

Juneau School Board Policy 5850, reprinted at App. 58a, states, in pertinent part:

> Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program.

STATEMENT OF THE CASE

A. Factual Background

1. Surveys of Juneau, Alaska teenagers indicate that at least 60% use marijuana before graduating from high school, which is above the national average. Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002.[1] In response to concerns about teenage

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[1] This article was included in the Ninth Circuit record as part of Appellant's Excerpts of Record at 43 and Appellees' Supplemental Excerpts of Record ("SER") at 37-43.

substance abuse, the Juneau School Board promulgated a district-wide health and safety curriculum that emphasizes the dangers of illegal drug and alcohol use. SER 11, 18. The Board also established detailed policies for prevention, intervention, and discipline of students engaging in the illegal use or possession of drugs or alcohol. SER 19-26. In connection with these policies, the Board prohibits the display of materials that advertise or advocate the use of illegal drugs or alcohol on campus and at all school-sponsored events, whether on or off campus. App. 52a-58a. These policies are consistent with both state and federal law, including 20 U.S.C. § 7114(d)(6), which requires school districts receiving funds through the Safe and Drug Free Schools and Communities Act to certify periodically that their programs "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." App. 49a.

2. Against this background, Principal Deborah Morse of the Juneau-Douglas High School was confronted with a flagrant violation of the school policies pertaining to pro-drug messages. The violation occurred during a school-sponsored and faculty-supervised event that took place on and adjacent to school grounds during school hours. The event was the Olympic Torch Relay, which came to Juneau on January 24, 2002.[2] Believing that the event had both

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[2] The Olympic Torch Relay is a long-standing Olympic tradition with roots in ancient Greece. *See generally* U.S. Olympic Comm., *Journey of the Olympic Flame: Igniting the Olympic Spirit* (2002). Every two years, in advance of the Olympic games, a ceremonial torch is ignited in Olympia, Greece and then travels to and throughout the country hosting the Olympic games. *Id.* at 9-10. The torch remains lit throughout its journey as thousands of torchbearers pass it from one to another until it reaches its final destination — the cauldron at the site of the opening ceremony for the Olympic games. *Id.* In 2002, the Winter Olympics took place in Salt Lake City, Utah. *Id.* at 123. January 24, 2002 marked

noteworthy educational value and high significance to the community, the Juneau School District allowed students to observe the relay. App. 34a. The district also allocated funds to transport students from schools not along the relay route to locations where they could view this memorable event. SER 4-5.

The Juneau-Douglas High School was located along the Olympic Torch Relay route. App. 24a. After classes started on the morning of the event, Juneau-Douglas High School administrators and teachers accompanied students from their classrooms to view the relay as it passed in front of the school. App. 24a-25a, 34a. While teachers were given the option of allowing their students to take part in this event on a class-by-class basis, Principal Morse was unaware of any teachers who declined to let their classes participate. SER 5-6, 70-77. Once outside the classroom, there was only one place where Juneau-Douglas High School students were allowed to be — in front of the school, either on campus or lined along either side of the street.[3] SER 6, 78-80.

During the event, high school cheerleaders were out in uniform to greet the torchbearers. App. 34a. The high school pep band played. *Id.* And four high school students, representing various segments of the student body, acted as

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the first time in Olympic history that the Olympic Torch Relay ever visited Alaska. *Id.* at 145. After landing in Juneau, the flame was welcomed by Tlingit Clan dancers, transported in a native canoe around Gastineau Channel, and then carried through several miles of Juneau's streets, including past the state Capitol, *id.*, and, as relevant here, the Juneau-Douglas High School.

[3] Because this event took place on and adjacent to school grounds, and because students remained under faculty supervision and were not otherwise released from school, the school did not require parental permission slips.

torchbearers, carrying the torch in front of the school as a small part of the 11,500-person chain of torchbearers who transported the torch along the 13,500-mile relay route. SER 5; U.S. Olympic Comm., *supra*, at 183.

3. Joseph Frederick, a Juneau-Douglas High School student, and several of his schoolmates positioned themselves on the sidewalk opposite the campus. App. 25a. As the torchbearers and television camera crews approached the school, Frederick and his friends unfurled a large banner emblazoned with the phrase "BONG HITS 4 JESUS." *Id.* "Bong" is a slang term for drug paraphernalia commonly used for smoking marijuana. App. 4a; SER 7, 126. A "bong hit" is slang for inhaling marijuana from such a device. App. 4a; SER 7. The term "bong hits" is widely understood by high school students and others as referring to smoking marijuana. App. 38a; SER 7. Frederick's banner, roughly 20-feet long,[4] was clearly visible to the large number of students on campus. App. 70a; SER 7.

Prior to displaying the banner, Frederick had been absent from school. App. 25a. And while Frederick might have selected any number of locations to unfurl his banner along the several-mile journey of the relay, Frederick chose instead to insert himself in front of the student body and to display the banner where it would be in full view of his fellow students.

Principal Morse approached Frederick and his friends and asked them to take down the banner. *Id.* While other students complied with the directive, Frederick continued to hold the banner and refused to take it down. *Id.* Frederick claimed he had a First Amendment right to display the

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[4] While Frederick's banner was not actually measured, a photograph taken of the incident shows approximately ten people standing shoulder-to-shoulder behind the banner. App. 70a.

banner because he was not physically on campus. App. 2a-3a; SER 7-8. Principal Morse responded to Frederick that he was participating in a school activity and that the banner was inappropriate. App. 3a. When Frederick still refused to put the banner down, Principal Morse confiscated it and instructed Frederick to accompany her to her office. App. 25a. Frederick walked the other way. *Id.*

Frederick was later removed from class and brought to the principal's office.[5] Principal Morse again explained that the banner was inappropriate in that it violated the school's policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs. App. 3a; SER 8-9. After further discussing the incident with a defiant and uncooperative Frederick, Principal Morse suspended him for ten days based on multiple counts, including refusal to respond to a staff directive, truancy/skipping, defiance/disruptive behavior, and refusal to cooperate, in addition to the underlying charge of displaying the offensive banner.[6] App. 59a, 66a-67a.

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[5] The parties' versions of the events in question differ in that Frederick claims he went to Principal Morse's office on his own, whereas Principal Morse contends that she had to look up Frederick's schedule and remove him from class. *Id.* Neither the district court nor the court of appeals deemed it necessary to resolve this factual dispute.

[6] Frederick claims that his suspension was increased from five days to ten days because he quoted Thomas Jefferson in his (Frederick's) colloquy with Principal Morse. App. 3a. For her part, Principal Morse does not recall such a quote and denies punishing Frederick on such grounds. *Id.* Indeed, school records are devoid of any evidence that Frederick was suspended for quoting Mr. Jefferson. As noted by the district court, Frederick's own testimony was to the effect that his suspension was enhanced for his refusal to cooperate. App. 38a-39a. In any event, the Ninth Circuit ultimately concluded that any dispute over the purported punishment for quoting Mr. Jefferson was immaterial. App. 3a.

Following the banner episode, school personnel reported incidents of pro-drug graffiti in the halls and on school grounds. App. 2a; SER 68.

B. Procedural History

1. Frederick appealed his suspension to Superintendent Gary Bader. App. 25a. In a seven-page response analyzing Principal Morse's discipline of Frederick in view of school board policies and this Court's precedents, Superintendent Bader upheld the Principal's decision. App. 59a-67a. He did, however, reduce the suspension to time served (eight days). App. 25a, 67a.

2. Frederick appealed to the School Board. App. 26a. Following a lengthy hearing that included witness testimony and legal argument from counsel for Frederick and for the district administration, the School Board unanimously upheld Superintendent Bader's decision. App. 26a, 69a.

3. Frederick filed suit in the United States District Court for the District of Alaska. On May 27, 2003, following cross-motions for summary judgment, Chief Judge John W. Sedwick issued an opinion granting petitioners' motion. App. 23a-40a; *see also* App. 41a-42a. On May 30, 2003, the district court entered judgment dismissing the action. App 43a-44a.

Chief Judge Sedwick concluded that petitioners did not in any fashion violate Frederick's First Amendment rights. The district court reasoned that the banner's message could be constitutionally prohibited under this Court's ruling in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). App. 33a-38a. *Fraser*, the district court explained, allows a public school to regulate speech that it reasonably interprets as "plainly offensive" because such speech "might undermine the school's basic educational mission." App. 36a. The court noted that Frederick's banner "directly contravened the Board's policies relating to drug abuse

prevention" and thus interfered with the school's educational mission to deter illegal drug use. App. 35a-36a. The court highlighted the broad interpretations given to *Fraser*, such as in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), where the Sixth Circuit concluded that a school could prohibit t-shirts depicting a rock band that promoted a drug-using lifestyle. App. 36a.

The district court further observed that *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), justified Principal Morse's actions. App. 35a-36a. In the court's view, *Tinker* allows schools to curtail speech that interferes with a school's work and, "[w]ithout a doubt, part of the school's work is to deter drug and alcohol abuse." App. 36a. Underlying the court's First Amendment analysis was an acknowledgement of the importance of deferring to school administrators' reasonable judgments where, as here, Frederick chose to display his banner at a "school-sponsored" activity. App. 33a-38a.

The district court also concluded, under both this Court's precedents and Alaska law, that petitioners were immune from any claim for money damages. App. 27a-32a. The court noted that (i) there was no case law on point to establish that Principal Morse's actions were unconstitutional; (ii) the cases cited by Frederick were all distinguishable; and (iii) Principal Morse's actions were not "so far-fetched as to make the illegality apparent." App. 27a-30a. Quite the contrary, the court observed that existing case law "shows that it was objectively reasonable for defendants to believe that their actions were proper." App. 28a.

4. On appeal, the Ninth Circuit reversed. The court of appeals found that the incident occurred while Frederick was a student and school was in session and that, accordingly, the case was to be resolved by applying "student speech"

doctrine under *Tinker*, *Fraser*, and *Kuhlmeier*.[7] App. 1a, 5a-6a. The court further assumed that Principal Morse correctly interpreted the phrase "BONG HITS 4 JESUS" as "express[ing] a positive sentiment about marijuana use." App. 6a-7a. The panel ruled, however, that the district court incorrectly applied the "plainly offensive" standard from *Fraser*. In the court of appeals' view, *Fraser* was inapplicable. The court narrowly interpreted *Fraser* as only allowing prohibitions on student speech of a "sexual nature." App. 9a. Applying that circumscribed standard, the court stated: "Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones)." *Id.* According to the panel, the district's policy of suppressing pro-drug messages, on the other hand, was just one of any number of "social message[s] contrary to the one favored by the school," and a school district is "not entitled to suppress speech that undermines whatever mission it defines for itself." App. 7a, 12a.

The court of appeals further reasoned that *Kuhlmeier* was inapplicable. App. 10a-11a. Whereas *Kuhlmeier* allows regulation of school-sponsored speech, 484 U.S. at 273, the panel noted that, here, Frederick displayed the banner off school property, in what it characterized as a "non-curricular activity" that was only "partially supervised." App. 17a.

Having eliminated *Fraser* and *Kuhlmeier* as bearing on the issue at hand, the Ninth Circuit concluded that the case was governed solely by *Tinker*. Under the rationale of that

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[7] The court of appeals variously referred to the Olympic Torch Relay as a an event sponsored by "Coca-Cola" and other "private" companies. App. 2a, 11a, 12a. At the same time, the Ninth Circuit concluded that "[t]his is a First Amendment student speech case" with the First Amendment providing the operative jurisprudential framework for analysis. App. 1a, 5a-6a; *see also* App. 33a-35a (district court's finding that the Olympic Torch Relay was a "school-sponsored" activity).

watershed decision, the court opined that petitioners could not punish Frederick for displaying his banner absent a showing that the banner "disrupts the good order necessary to conduct [the school's] educational function." App. 11a. The panel concluded that petitioners could not demonstrate that requisite element of "disruption," and that they therefore violated Frederick's First Amendment rights. App. 18a. In short, the Ninth Circuit discerned no difference between Frederick's pro-drug message and the anti-war armband passively worn by John Tinker as a form of political expression. App. 8a, 11a.

The court of appeals further concluded that Principal Morse was not entitled to qualified immunity. In the panel's view, the case law "succinctly explained how to apply the various Supreme Court doctrines . . . , thus ensuring that opacity in this particular corner of the law has been all but banished." App. 20a. Having found a constitutional violation, the court determined that Principal Morse violated Frederick's "clearly established rights." App. 20a. The panel thus vacated the district court's judgment and remanded to determine Frederick's monetary damages. App. 22a.

5. The Ninth Circuit subsequently denied the petition for rehearing and rehearing en banc. App. 45a-46a.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, the Ninth Circuit's decision, as a practical matter, renders long-standing, commonplace school policies against pro-drug messages unenforceable. While lower courts throughout the country have struggled in applying this Court's student speech precedent, courts have nonetheless found their way to upholding *bans* on messages promoting illegal substances (because such messages are so antithetical to the learning environment). The Ninth Circuit has now profoundly disrupted this settled understanding.

This case presents the Court with a much-needed opportunity to resolve a sharp conflict among federal courts (and to eliminate confusion on the part of school boards, administrators, teachers, and students) over whether the First Amendment permits regulation of student speech when such speech is advocating or making light of illegal substances.

Second, the Ninth Circuit's qualified immunity analysis unsparingly allows no room for reasonable error on the part of public school officials. Indeed, in the Ninth Circuit, school officials are held to a higher standard than federal judges. When the Ninth Circuit opined that "no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful," App. 21a, the court blinked at the telltale fact that a respected federal district court judge, in a thorough opinion, had upheld Principal Morse's actions as entirely proper under the First Amendment. To make bad matters worse, the Ninth Circuit precipitously jumped from its flawed First Amendment conclusion to an automatic finding that Principal Morse violated a "clearly established right" — even though no Ninth Circuit authority was on point; even though other courts have consistently upheld schools' curtailment of pro-drug messages; and even though Principal Morse was faithfully enforcing the school board policies as written. *Frederick*'s qualified immunity analysis creates a dangerous precedent, deeply alarming to school administrators throughout the country. The case cries out for this Court's review.

I. THE COURT SHOULD CLARIFY WHETHER THE FIRST AMENDMENT REQUIRES PUBLIC SCHOOLS TO TOLERATE MIXED MESSAGES ABOUT ILLEGAL DRUG USE.

1. In the two decades since this Court last provided substantive guidance in the area of student speech, lower courts grappling with the First Amendment rights of public

high school students generally have analyzed disputes under the so-called *Tinker-Fraser-Kuhlmeier* trilogy.

Student speech cases start with the Vietnam War-era decision of *Tinker*. Recognizing that students do not shed their free speech rights at the schoolhouse gate, the *Tinker* Court upheld the right of students to wear anti-war armbands. 393 U.S. at 506. The Court found that passively wearing black armbands was akin to pure political speech, which is entitled to comprehensive protection. *Id.* at 505-06. On the other hand, the Court acknowledged the unique characteristics of a school and that administrators and teachers may suppress student conduct, whether in class or out of it, that would disrupt school operations. *Id.* at 511-13. In *Tinker*, however, there was no evidence that the silent, passive expression of opinion intruded upon the work of the school. *Id.* at 508.

Almost two decades later, the Court clarified in *Fraser* that schools may suppress vulgar, lewd, indecent, obscene, and plainly offensive student speech, even absent a showing of disruption. 478 U.S. at 683-84. Such speech, ruled the Court, "would undermine the school's basic educational mission" and "is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. Applying that principle, the *Fraser* Court upheld a school's right to discipline a student for delivering a sexually suggestive nominating speech for a student government candidate at a school assembly. *Id.*

Finally, almost two decades ago in *Kuhlmeier*, the Court acknowledged that school officials are entitled to exercise pervasive control over speech that reasonably might be perceived to bear the imprimatur of the school so long as the curtailment of such speech is reasonably related to "legitimate pedagogical concerns." 484 U.S. at 273. In the *Kuhlmeier* Court's view, a school properly exercised its discretion in refusing to publish student articles on pregnancy

and divorce in a school-funded student newspaper. *Id.* at 276.

2. In determining the constitutionality of a school's speech regulation under this "trilogy," many courts have tended to examine whether the proscribed speech is (i) disruptive of schoolwork and discipline under *Tinker*, (ii) vulgar, lewd, indecent, obscene, or plainly offensive under *Fraser*, or (iii) reasonably perceived as school-sponsored under *Kuhlmeier*. Unfortunately for local school officials tasked with keeping order and inculcating values, not all student speech falls neatly into these three categories. Adhering to a rigid categorical analysis, as manifested by the Ninth Circuit in this case, leads to a result that is utterly unfathomable to conscientious school officials and jurisprudentially baffling to judges.

Indeed, in a dissent in another recent Ninth Circuit student speech case, Judge Kozinski commented on the difficulties faced by courts in attempting to classify student speech under the appropriate category:

> Reconciling *Tinker* and *Fraser* is no easy task. The Supreme Court majority in *Fraser* seems to have been influenced by the indecorousness of Fraser's comments, which referred to a fellow student in terms that could be understood as a thinly-veiled phallic metaphor. The curious thing, though, is that Fraser used no dirty *words*, so his speech could only have been offensive on account of the ideas he conveyed — the ideas embodied in his elaborate double-entendre.

Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting) (citations omitted). Judge Kozinski thus wonders whether "*Fraser* swallows up *Tinker*, by suggesting that some ideas can be excluded from the high school environment, even if they don't meet the *Tinker* standard." *Id.* This candid identification of doctrinal

fog infecting student speech jurisprudence is at stark odds with *Frederick*'s assertion that "opacity in this particular corner of the law has been all but banished." App. 20a.

a. In the context of regulating pro-drug messages in schools, courts have wrestled with the *Tinker-Fraser-Kuhlmeier* trilogy. Yet, the courts had reached a bottom-line consensus — at least prior to *Frederick*. Applying *Fraser*, several courts recognized that prohibitions on pro-drug messages are constitutional because such expression is offensive and inconsistent with the mission of schools to promote healthy lifestyles (including by seeking at every turn to combat substance abuse). *See, e.g., Boroff*, 220 F.3d at 471 (upholding ban on Marilyn Manson t-shirts because singer promoted drug use),[8] *cert. denied*, 532 U.S. 920 (2001); *Nixon v. N. Local Sch. Dist.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) ("Examples [of offensive speech under *Fraser*] are speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder."); *Guiles v. Marineau*, 349 F. Supp. 2d 871, 881 (D. Vt. 2004) (accepting school's judgment that drug images on student's t-shirt were offensive under *Fraser*); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 859 (E.D. Mich. 2003) ("[W]hen student speech is . . . lewd, obscene, or vulgar (including related to alcohol or drugs), school officials may curtail that speech."); *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796, 798-99 (D. Idaho 1987) (upholding prohibition of t-shirt depicting drunken

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[8] Even the dissent in *Boroff* found agreement with the majority that a school could prohibit pro-drug messages. 220 F.3d at 474 (Gilman, J., dissenting) ("If the majority is suggesting that the School could have concluded that Marilyn Manson's apparent endorsement of, say, illegal drug use, makes his picture an unacceptable image for students to wear in high school, I would agree.").

administrators under *Fraser*, noting that schools have duty to teach about harmful effects of alcohol).

Other courts reached the same result in applying *Tinker*; those courts observed that there can be little dispute that messages promoting illegal substances cause disruption to schools. For example, the Fourth Circuit, in a pre-*Fraser* opinion, took judicial notice that messages promoting drug use endanger students' health and safety. The court held, accordingly, that a school could prohibit distribution of an underground newspaper containing advertisements for drug paraphernalia. *Williams v. Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980); *cf. McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1420-21, 1426 (W.D. Okla. 1992) ("Reasonable school officials could forecast that the wearing of clothing bearing a message advertising an alcoholic beverage would substantially disrupt or materially interfere with the teaching of the adverse effects of alcohol and that its consumption by minors is illegal and/or would substantially disrupt or materially interfere with school discipline.").

So too, in *Kuhlmeier*, this Court singled out pro-drug speech as a type of student expression that schools must have latitude in regulating: "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use . . . ." 484 U.S. at 272; *see also Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1219 (11th Cir. 2004) (approving viewpoint discrimination in school-sponsored speech to forbid pro-drug messages); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (permitting school policy banning ads in school publications for tobacco and liquor products); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 920 (E.D. Mo. 1999) (upholding prohibition against school band playing song "White Rabbit" because it might "reasonably be perceived" to advocate the use of illegal drugs).

b. Commentators likewise have acknowledged that schools enjoy the prerogative of proscribing student speech that supports drug, alcohol, or tobacco use. *See, e.g.*, 1 Ronna Greff Schneider, *Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:3 (2006) ("The determination of what constitutes lewdness or vulgarity is within the role of the school board rather than the courts. . . . [C]ourts have upheld school prohibitions of wearing t-shirts that may . . . compromise the school's ability to teach substance abuse . . . ." (citations omitted)); Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 Harv. C.R.-C.L. L. Rev. 217, 238 (2004) ("[T]he Court seemed prepared to allow the school to censor viewpoint-based student speech that might appear to advocate the use of alcohol or drugs."); Perry A. Zirkel, *Censoring or Censuring Student Speech: A Checklist*, 121 Educ. L. Rep. 477, 479 (1997) (setting forth an annotated flowchart for education practitioners, which, among other things, asks: "Is the student's expression lewd or otherwise offensive — e.g., based on sex, alcohol/drugs, or violence? . . . If YES and you[] are sued, you're likely to win." (citations omitted)).

c. School board policies across the country are largely in accord with Juneau's. While daunting to quantify with precision the number of school districts that prohibit advertisements or depictions of illegal substances, available statistics indicate that the Ninth Circuit's ruling would call into question the enforcement of standard policies adopted by the vast majority of public schools across the nation.

For example, in Arizona, which has its individual school policies available online, at least 90% of schools have anti-substance dress code policies (e.g., "Obscene language or symbols, or symbols of sex, drugs, or alcohol on clothing are expressly prohibited."). *See* Arizona School Board

Association Manuals, http://lp.ctspublish.com/asba/public/lpext.dll?f=templates&fn=main-h.htm.[9] And the standard policy adopted by most Arizona schools further provides that such rules shall be in effect during school hours and at all school-related functions. *Id.*

Similarly, the California School Boards Association's model policies provide that "[c]lothing, jewelry and personal items (backpacks, fanny packs, gym bags, water bottles etc.) shall be free of writing, pictures or any other insignia . . . which bear drug, alcohol or tobacco company advertising, promotions and likenesses" and further states that such rule "shall apply to all regular school activities." CSBA Sample Administrative Regulation § AR5132 (2001).

School officials in Arizona and California, which are bound by *Frederick*'s rigid analytical framework, would face a vexing dilemma. As a practical matter, the Ninth Circuit's ruling eviscerates the enforcement of such policies as written, unless school officials are confident that they can prove substantial and material disruption to school operations. Though *Frederick* stopped short of opining whether a t-shirt emblazoned with "BONG HITS 4 JESUS" could be constitutionally prohibited, the rationale of *Frederick* is equally applicable to clothing. Whether on a banner or on a t-shirt, whether in school or at an off-campus school activity, *Frederick* tells schools that they can no longer rely on the fact that illegal drugs undermine the educational mission of the schools. Rather, they must be prepared to defend their

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[9] Of the 230 Arizona school district policies listed on this website, 207 have anti-substance dress code policies, 195 of which contain the State's standard language as quoted above and 12 of which have their own unique language. The other 23 schools do not have such policies, but, of these, 14 have school uniform policies that excuse the need for anti-substance dress code policies.

enforcement of such policies by producing substantial and material evidence of disruption in a court of law.

Meanwhile, outside the Ninth Circuit, school officials must consider whether they are willing to face the same fate as Principal Morse, in view of the underdeveloped (and now confused) state of the law. Again, the number of such officials who potentially could run afoul of the *Frederick* standard is extraordinarily high.

In Texas, for example, approximately 99% of public school districts have adopted the Texas Association of School Board's recommended policy language. That model policy prohibits clothing "advertising or depicting tobacco products, alcohol, or drugs" and applies during school and may be enforced during extracurricular activities.[10]

Published research examining such policies similarly shows that such regulations are widely prevalent. An empirical study on student handbooks in Illinois found that 83.75% of a sampling of schools prohibited messages promoting drugs or alcohol. Jane E. Workman & Beth Winfrey Freeburg, *Safety and Security in a School Environment: The Role of Dress Code Policies*, J. Fam. & Consumer Sci., April 1, 2006, at 19. Another study based on questionnaires of a randomly-selected national sample of principals found that the prohibition of expression related to illegal substances was one of the "most frequently" occurring

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[10] The Texas Association of School Boards Policy Service, which offers model local policies to school districts in Texas, also maintains the policy manuals (most of which are online or otherwise retrievable using search engines) for all 1,036 Texas school districts. *See* TASB Policy Service, http://www.tasb.org/services/policy/index.aspx; *see also* Tex. Educ. Agency, Texas Education Directory, http://askted.tea.state.tx.us/org-bin/school/SCHOOL_RPT?Y::All::DistDirectory. Approximately 1,025 of these districts have adopted TASB's recommended anti-substance dress code language (found at code "FNCA" in school policy manuals).

categories for student dress codes: "Statements, depictions, and/or advertisements for drugs, alcohol, and tobacco products were prominently banned." Todd A. DeMitchell et al., *Dress Codes in the Public Schools: Principals, Policies, and Precepts*, 29 J.L. & Educ. 31, 42-43 (2000).

Additionally, numerous state school board associations promulgate guidelines and model policies, which are illustrative of the policies typically found in schools in those States. The New York State School Boards Association, for instance, recommends that schools adopt a policy that "[a] student's dress, grooming and appearance, including hair style/color, jewelry, make-up, and nails, shall ... [n]ot promote and/or endorse the use of alcohol, tobacco or illegal drugs and/or encourage other illegal or violent activities." NYSSBA Sample Policy § 5300.25 (2006). And that policy is prefaced by an admonition that "this code applies to all students, school personnel, parents and other visitors when on school property or attending a school function." § 5300.05.

Likewise, the Wisconsin Association of School Boards provided the following example of an acceptable implemented policy for regulating student dress: "[S]tudents are prohibited from wearing clothing that ... promotes, depicts or advertises alcohol, drugs, [or] tobacco products .... The policy applies during the school day, in school buildings and vehicles, and at all school-sponsored activities." Wis. Ass'n Sch. Bds., *Regulating Dress and Grooming*, The Focus, Dec. 2003, at 5.

Examples of such school policies can be found in every federal judicial circuit. These policies illustrate a heretofore settled understanding that schools enjoy authority to proscribe student expression promoting illegal substances without any heightened evidentiary requirement (of showing disruption to school operations). The Ninth Circuit has dramatically altered the legal landscape. The *Frederick*

decision appears to be the first case in American jurisprudence that any court — federal or state — has denied public school officials the authority to proscribe pro-drug messages. At a minimum, the Ninth Circuit's opinion is the most far reaching limitation to date on the authority of school boards, principals, and teachers to regulate student expression advocating illegal substances.

3. Contrary to the Ninth Circuit's inflexible approach in *Frederick*, this Court repeatedly has acknowledged that school officials enjoy considerable deference in carrying out their demanding and sensitive responsibilities. The Court has recognized the importance of school officials' "comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools," *Tinker*, 393 U.S. at 507; that schools should be accorded a "certain degree of flexibility," *Fraser*, 478 U.S. at 686 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)); and that the First Amendment rights of public school students must be "applied in light of the special characteristics of the school environment." *Kuhlmeier*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506). *See also Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999) ("We have observed, for example, 'that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'" (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995))); *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs.").

Frederick's non-deferential approach is at war with this Court's pronouncements. It conveys a muddled message as to what constitutes permissible school speech, particularly in view of Congressional encouragement and the widespread

adoption of school policies restricting pro-drug speech. The time is ripe for this Court to clarify ambiguities infecting the law of schoolhouse speech over the last two decades. To that needed end, this case presents an appropriate vehicle for delineating the reach of the Free Speech Clause in proscribing messages promoting illegal substances.

Specifically, the Court can (and should) clarify the relevance, if any, of *Tinker* in situations that do not involve a specific evidentiary showing of disruption. The Court also can clarify the relevance, if any, of *Fraser* in categorizing pro-drug messages as plainly offensive. Finally, the Court can clarify the relevance, if any, of *Kuhlmeier* in situations where students broadcast messages during supervised school activities and where they are, in effect, representing their school to the public at large.

4. It is of central importance to our nation's school districts that they receive definitive guidance from this Court on the extent of their ability to regulate expression advocating drugs and other illegal substances. After all, fighting teenage substance abuse constitutes "a pressing concern in every school." *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002); *see also Vernonia*, 515 U.S. at 661-62 ("[T]he necessity for the State to [counter the effects of drugs in schools] is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.").

Messages matter. As Congress recognized in passing the Safe and Drug Free Schools and Communities Act, 20 U.S.C. § 7101 *et seq.*, drug use is a social phenomenon. To state the painfully obvious, impressionable adolescents face strong pressures to use drugs as they confront pro-drug messages from peers, adults, and the media. In view of the devastating impact illegal drug use has both on students and the learning environment, schools should be afforded significant latitude

in discouraging substance abuse. Part of maintaining a drug-free environment is ensuring that students are not confronted with inconsistent messages, particularly while school is in session.

5. Courts have recognized that speech promoting drugs, alcohol, and tobacco — particularly when targeting an audience of children — ought to be treated differently. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 599 (2001) (Souter, J., concurring in part and dissenting in part) ("[F]ew interests are more 'compelling,' than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance ...."); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996) (upholding city ordinance banning outdoor alcohol advertising in certain areas where children are likely to be present). By refusing to differentiate the pro-drug message on Frederick's banner from the armbands in *Tinker*, the Ninth Circuit trivializes the drug crisis in our nation's schools. To make matters even worse, the court below ignores this Court's and Congress' support for efforts to eliminate drugs and pro-drug messages from the educational setting. Schools should not be required to tolerate pro-drug messages, particularly when they are under federal mandate to maintain a clear and consistent message that illegal drug use is wrong and harmful.

II. THE DECISION BELOW RADICALLY DEPARTS FROM WELL-ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY.

1. Principal Morse was in a situation all too familiar to school administrators. She was responsible for maintaining order at a gathering of hundreds of students and was suddenly confronted with a disruptive situation. Her response was to follow school board policies to the letter. Not only does Juneau School Board Policy 5520 "prohibit[]

any assembly or public expression that . . . advocates the use of substances that are illegal to minors," Policy 5850 explicitly states that a student such as Frederick who was "participat[ing] in [an] approved social event[]" is "subject to district rules for student conduct." App. 53a, 58a. As we have seen, such policies are commonplace in public school systems throughout the country. In addition, this Court has stated repeatedly that local school officials are to be accorded considerable deference in managing student conduct.

Not surprisingly, then, Principal Morse's decision to confiscate Frederick's banner and suspend him based on his cumulative infractions was sustained by Superintendent Bader. Following a full hearing, the School Board likewise upheld her actions without dissent. Principal Morse's decision was yet again tested and upheld by a federal district court judge who, in a fourteen-page summary judgment ruling, concluded that Principal Morse "had the authority, if not the obligation, to stop such messages at a school sanctioned activity." App. 37a.

The Ninth Circuit ultimately concluded that Principal Morse, Superintendent Bader, the Juneau School Board, and Chief Judge Sedwick all misapprehended the law. But when the Ninth Circuit further found that Principal Morse violated Frederick's "clearly established rights" (and is therefore liable for damages), the court departed from important guiding principles of the qualified immunity doctrine. Notably, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [governmental actors] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Here, the Ninth Circuit holds Principal Morse to a higher standard on understanding the law than a highly respected federal district court judge with over a decade's experience on the bench. That should not be.

2. The Ninth Circuit's error stems from the manner in which it recast this Court's two-part qualified immunity test from *Saucier v. Katz*, 533 U.S. 194 (2001). In *Saucier*, this Court rejected the Ninth Circuit's qualified immunity test because it improperly fused the question whether a constitutional violation occurred with the question whether the defendant had qualified immunity. The Ninth Circuit's framing of the qualified immunity doctrine in *Frederick* suffers from the same analytical flaw.

Frederick fashions a three-part test from *Saucier*:

> First, we must determine whether the facts alleged show Morse's conduct violated a constitutional right. Second, we must determine whether the right was clearly established at the time of the alleged violation. Finally, we must determine whether it would be clear to a reasonable principal that her conduct was unlawful in the situation she confronted.

App. 18a-19a (citations and internal brackets and quotation marks omitted).

a. The Ninth Circuit began its qualified immunity analysis by restating its hindsight determination that Principal Morse violated Frederick's First Amendment rights — a determination that relied, in part, on case law decided after the January 24, 2002 incident, as well as a case still pending appeal at that time. *See* App. 9a n.14 (citing *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003)), 14a & n.32 (citing *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (2001), *cert. denied*, 536 U.S. 959 (2002)), n.33 (citing *Newsome v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003)), 15a & n.38 (citing *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003)); 15a-16a n.40 (citing *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002))).

b. The court of appeals next determined that Frederick's right to display a large banner proclaiming "BONG HITS 4 JESUS" during schools hours at a school-sanctioned and supervised event was "clearly established." The panel conceded that there was "no Ninth Circuit authority precisely on point" and offered only that "what we do have is consistent with the above analysis." App. 12a. Finding precedent that may be "consistent with" a certain conclusion is emphatically not the test for determining a "clearly established right." Denial of a governmental actor's qualified immunity cannot rest on previously articulated general principles, but instead requires a greater degree of specificity that would put the government actor on notice. *Saucier*, 533 U.S. at 201. If no precedent is on point, there must at least be precedent finding "a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Id.* at 202-03. No such case law existed. Prior to *Frederick*, no court had rejected the authority of public schools to regulate student speech promoting illegal drugs.[11]

The Ninth Circuit attempted to bolster its opinion that Principal Morse violated a "clearly established right" by making two irrelevant observations. *First*, the panel noted that Principal Morse admitted to being aware of this Court's opinions in *Tinker*, *Fraser*, and *Kuhlmeier* from her "advanced school law" course. App. 20a. That misses the analytical mark. Principal Morse's subjective beliefs do not matter in a test that turns on "objective legal reasonableness."

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[11] Alluding to *Frederick*, Judge Kozinski opined that whether a student's t-shirt was "plainly offensive" under *Fraser* was, "[u]ntil recently, . . . a closer question." *Harper*, 445 F.3d at 1193 (Kozinski, J., dissenting). Judge Kozinski candidly recognized that, at the time of the incident in *Frederick*, the parameters of "plainly offensive" speech under *Fraser* were still in flux.

Wilson, 526 U.S. at 614. In any event, her subjective belief was that she had correctly applied general principles of law. *Second*, the panel noted that "the only times other circuit courts have held that conduct like Morse's is not a constitutional violation, they have done so under facts 'distinguishable in a fair way from the facts presented in the case at hand.'" App. 19a. Whether case law supporting the constitutionality of Principal Morse's actions is "distinguishable in a fair way" may matter to the determination of whether there has been a constitutional violation, but it matters little in analyzing qualified immunity.

c. The Ninth Circuit turned, finally, to what it identified as the third part of its qualified immunity test, but which is actually the analysis that this Court requires for determining whether a right is "clearly established" — whether the unlawfulness of the scrutinized conduct would be clear to a reasonable public official in the specific circumstances at hand. *Saucier*, 533 U.S. at 202. In a pivotal move, the panel turned away from any substantive analysis under this critical step: "Once we have held that 'the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [the official's] conduct.'" App. 21a (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). By this approach, the Ninth Circuit effectively eliminated the most important step in the qualified immunity analysis.

In sum, the Ninth Circuit's qualified immunity analysis in *Frederick* revives the cardinal sin committed in *Saucier*. The panel confused general propositions for a "clearly established right" and failed to make an appropriately particularized finding as to whether a reasonable principal in Ms. Morse's position would have concluded that her discipline of Frederick was unlawful.

3. The Ninth Circuit thereby set a perilous example for other courts to follow. Under the *Frederick* standard, governmental actors faced with legal uncertainty will have to predict the future course of constitutional law under penalty of harsh civil damages lawsuits. This disruptive jurisprudential development in the multi-State mega-Circuit of the Ninth threatens to compromise public school administration in the West — and beyond — in a fundamental way. A critical "goal of qualified immunity [is] to 'avoid excessive disruption of government.'" *Saucier*, 533 U.S. at 202 (quoting *Harlow*, 457 U.S. at 818). In our litigious culture, "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). This problem is especially pronounced here, where the law governing student speech is still relatively undeveloped, and manifestly so since this Court has not provided substantive guidance in almost twenty years. School administrators have a difficult enough job maintaining order without the daunting threat of liability for damages solely because their legal sophistication does not allow them to predict the future course of appellate jurisprudence.

4. In view of the manifest error infecting the Ninth Circuit's qualified immunity analysis, this Court may wish to consider summary reversal. At a minimum, the Court should grant review to provide much-needed guidance on (i) the meaning of a "clearly established right" and (ii) whether, in light of the broad latitude traditionally accorded public school officials in their day-to-day discretionary functions, the qualified immunity doctrine should be applied more flexibly in the sensitive context of public school education.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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August 28, 2006

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 10, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH FREDERICK,

Plaintiff-Appellant,

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Defendants-Appellees.

No. 03-35701.

Argued and Submitted July 8, 2004. Filed March 10, 2006.

Appeal from the United States District Court for the District of Alaska; John W. Sedwick, District Judge, Presiding. D.C. No. CV-02-00008-J-JWS.

Before: HALL, KLEINFELD, and WARDLAW, *Circuit Judges*.

KLEINFELD, *Circuit Judge*:

This is a First Amendment student speech case.

Appendix A

Facts

One January day, Coca-Cola and other private sponsors supported a "Winter Olympics Torch Relay" in Juneau, Alaska. Students were released from school so that they could watch the Olympic torch pass by. Joseph Frederick, then an 18-year-old senior at Juneau-Douglas High School, never made it to school that morning because he got stuck in the snow in his driveway, but he made it to the sidewalk, across from the school, where the torch would pass by. He and some friends waited until the television cameras would catch it, then unfurled a banner reading "Bong Hits 4 Jesus." Deborah Morse, the school principal, crossed the street, grabbed and crumpled up the banner, and suspended Frederick for ten days. He appealed the suspension administratively, but it was sustained. He then filed a 42 U.S.C. § 1983 action in the Federal District Court seeking declaratory and other relief.

There was disorder at the torch passing, but the uncontradicted evidence is that it had nothing to do with Frederick and his fellow sign-holders. Coca-Cola handed out samples in plastic bottles, and students threw them at each other. Students threw snowballs. Some students got into fights. But Frederick and his group did not participate in these disorders, saving their energy for what they hoped would be their nationally televised sign display. And, the disruption that took place occurred before the display of the banner, so it could not have been caused by it.

In subsequent days, there was some pro-drug graffiti in the high school which the principal thought was "sparked" by the banner, but the principal did not rip down the sign at the rally because she anticipated or was concerned about such possible consequences. When Principal Morse crossed the

street from the school and confronted Frederick about the banner, he asked "What about the Bill of Rights and freedom of speech?" She told him to take the banner down because she "felt that it violated the policy against displaying offensive material, including material that advertises or promotes use of illegal drugs," and she grabbed it from him and crumpled it up.

In their answers to interrogatories, Appellees never contend that the display of the banner disrupted or was expected to disrupt classroom work. Asked for all the ways in which the banner display disrupted the educational process, they said:

Display of the banner would be construed by many, including students, district personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use which is inconsistent with the district's basic educational mission to promote a healthy, drug-free life style. Failure to react to the display would appear to give the district's imprimatur to that message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior.

There are some genuine disputes about the facts, but they are not material to the resolution of this case. Frederick says that the principal initially told him that he was suspended for five days, but when he quoted Thomas Jefferson to her, she doubled it. The principal says that she does not remember whether he quoted Jefferson to her, but that was not why the suspension was ten days. Frederick says that an assistant principal told him that the Bill of Rights does not exist in schools and does not apply until after graduation, but Principal Morse says that the assistant principal "made some remark to the effect that students do not have the same first amendment rights as adults." Frederick says that students

were simply released from school so that they could watch the privately sponsored Olympic Torch being carried through a public street, and a student affidavit he submitted pointed out that the students did not have to obtain parental permission slips to be released, as is the routine for field trips and other supervised events off of the school premises. Principal Morse says that the release was "an approved social event or class trip," noting that the pep band played as the torch passed the school, the cheerleaders were out in uniform to greet the torchbearers, and teachers supervised.

Frederick says (without contradiction) that he had not gone to school that day prior to the banner display, that the banner display was off school property across Glacier Avenue from the campus, and that there were a lot of people, students and non-students, there to watch the torch pass. Other students filed affidavits saying that they were just released, not required to stay together or with their teachers, except for the gym class, and school administrators did not attempt to stop students who got bored and left. Frederick says that the "Bong Hits 4 Jesus" language was designed to be meaningless and funny, in order to get on television, but Principal Morse says that "bong hits" means puffs of marijuana and the words promote marijuana use.

Frederick was suspended for ten days, and appealed unsuccessfully through all levels of available administrative and school board review. He sued under 42 U.S.C. § 1983 for a declaratory judgment that his First Amendment rights had been violated, an injunction to remove the reference to the ten day suspension from his school records, damages, and other relief. The district court granted summary judgment for the Appellees, on the grounds that no constitutional rights were violated and the Appellees had qualified immunity even if they were. Frederick appeals.

Appendix A

Analysis

We review a grant of summary judgment de novo.[1] The district court reasoned that *Bethel School District No. 403 v. Fraser*,[2] as opposed to *Tinker v. Des Moines Independent Community School District*,[3] governed Frederick's speech. We disagree.

One amicus, Drug Policy Alliance, argues that we should analyze this not as a student speech case, but simply as speech on a public sidewalk. That would make the case analogous to a student having an after-school job at a video store that rents out Cheech and Chong tapes, or a student driving a car on public streets with a "Bong Hits 4 Jesus" bumper sticker. Were this factually such a case, the law would be easy indeed, but the facts established by the submissions on summary judgment make this a student speech case. Even though Frederick never got to school that morning, that was only because he got stuck in his driveway because of the snow. School had started and the students were released to watch the Olympic torch pass. And even though supervision of most students was minimal or nonexistent, the school could have supervised them more if it chose to, as it did with the gym class and perhaps the pep

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[1] *Holley v. Crank*, 400 F.3d 667, 672 (9th Cir. 2005).

[2] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that the school district permissibly sanctioned a student for his sexually explicit speech at a school assembly).

[3] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969) (holding that students retain First Amendment expression rights at school, which may be suppressed only if authorities reasonably "forecast substantial disruption of or material interference with school activities").

band and cheerleaders. Frederick was a student, and school was in session.

There is no genuine issue of fact material to the decision. Frederick's display was not in a class. Frederick and the other students who displayed the sign did not participate in any of the disorderly conduct of the students who threw snowballs or plastic Coca-Cola miniature sample bottles. The school principal and school board do not claim that the display disrupted or was expected to disrupt any classroom work. They concede that their objection to the display, and the reason why the principal ripped down the banner, was not concern that it would cause disruption but that its message would be understood as advocating or promoting illegal drug use.[4] Frederick says that the words were just nonsense meant to attract television cameras because they were funny. We nevertheless proceed on the basis that the banner expressed a

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[4] The issue of "illegal" drug use is a little complicated under Alaska law. Alaska has an express constitutional right to privacy that the federal constitution does not have. The Alaska Supreme Court has held unanimously that the state had the burden of justifying its statute prohibiting marijuana use, and "no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown." *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975), followed in *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003). Frederick was an adult citizen of Alaska, not a minor, at the time he displayed the sign. The Alaska Supreme Court has also taken a libertarian position regarding schoolchildren, holding that no "compelling state interest" justified a school regulation on boys' hair length. *Breese v. Smith*, 501 P.2d 159 (Alaska 1972). Alaska has had repeated referenda about whether, and to what extent, to criminalize or legalize marijuana, *see Noy*, 83 P.3d at 545-46, so messages about marijuana have a degree of political salience to them and might be understood as political advocacy. We need not reach any questions of Alaska law.

positive sentiment about marijuana use, however vague and nonsensical.

Thus, the question comes down to whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school. The answer under controlling, long-existing precedent is plainly "No."

Because this is a section 1983 case in which the Appellees asserted qualified immunity, we are required to proceed in accord with *Saucier v. Katz*[5] and determine first whether Frederick's constitutional rights were violated. This is an "as applied" challenge, not a "facial" challenge. Frederick argues that his rights were violated as the regulations were applied to him.[6] Under *Tinker v. Des Moines Independent Community School District*,[7] they plainly were.

In *Tinker*, the Supreme Court held that wearing black arm bands in high school, "unaccompanied by any disorder or disturbance on the part of [the arm-band wearers]," and unaccompanied by "interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone," was constitutionally

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[5] *Saucier v. Katz*, 533 U.S. 194 (2001).

[6] *See Vlasak v. Superior Court of Cal. ex rel. County of Los Angeles*, 329 F.3d 683, 688 (9th Cir. 2003).

[7] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

protected speech.[8] *Tinker* held that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[9]

Tinker disposes of the School Board's argument that "school administrators were entitled to discipline Frederick's attempt to belittle and undercut this critical mission" of preventing use of illegal drugs by a sign that was "a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs." Under *Tinker*, a school cannot censor or punish students speech merely because the students advocate a position contrary to government policy. The *Tinker* armbands were about war. Government has no mission in which victory is so important as war. The federal government was, at the time of the facts giving rise to the *Tinker* case, prosecuting a war. Government policy was to support and advance the effort to win the war. The black armbands in *Tinker* expressed hostility to the war. By doing so, they legitimized opposition and undermined support for the war. Yet the students in high school had a constitutional right to express their opposition to this critically important mission of the federal government.

The two leading Supreme Court cases that have held against students claiming First Amendment rights to speak in a way unacceptable to school administrators are distinguishable. *Bethel School District No. 403 v. Fraser*[10]

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[8] *Id.* at 508.

[9] *Id.* at 511.

[10] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)

held that a high school student did not have a First Amendment right to give a sexually suggestive nominating speech for a candidate for student office at a school assembly that "was part of a school-sponsored educational program in self-government," where disruption immediately ensued as the student gave the speech.[11] *Fraser* holds that high school students's rights to free speech in school are not coextensive with adults's rights, and "pervasive sexual innuendo" that is "plainly offensive . . . to any mature person" can be marked off as impermissible incivility within the school context.[12] *Fraser* focuses upon the sexual nature of the offensiveness in the in-school speech that can be punished, as contrasted with the "political viewpoint" of the speech protected in *Tinker*.[13] Our case differs from *Fraser* in that Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones), and did not disrupt a school assembly. Also, it is not so easy to distinguish speech about marijuana from political speech in the context of a state where referenda regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued.[14] The phrase "Bong Hits 4 Jesus" may be funny, stupid, or insulting, depending on one's point of view, but it is not "plainly offensive" in the way sexual innuendo is.

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[11] *Id.* at 677-78.

[12] *Id.* at 683.

[13] *Id.* at 685.

[14] *See Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003)

Appendix A

Hazelwood School District v. Kuhlmeier[15] is similarly distinguishable. In *Kuhlmeier*, the Supreme Court held that high school students did not have a First Amendment right to publish articles on pregnancy and divorce in a school newspaper over the principal's objection, where the newspaper was produced in a class on journalism, edited by the journalism teacher as part of the teaching of the class, and paid for with school money.[16] The Court distinguished *Tinker* on the ground that "[t]he question whether the First Amendment requires a school to tolerate particular student speech-the question that we addressed in *Tinker*-is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[17] This student newspaper was "part of the school curriculum."[18] Exclusion of any First Amendment duty to "promote" a student viewpoint means that a school necessarily retains authority to refuse to "sponsor" speech such as Frederick's, which arguably promotes drug use.[19] *Kuhlmeier* does not control the case at bar, however, because Frederick's pro-drug banner was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as part of an official school activity. *Kuhlmeier* might apply had Frederick insisted on making his "Bong Hits 4 Jesus" banner in art class, but that is not what the record

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[15] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)

[16] *Id.* at 268-73.

[17] *Id.* at 270-71.

[18] *Id.* at 271.

[19] *Id.* at 272.

shows. His display took place out of school while students were released so that they could watch a Coca-Cola and Olympics activity.

Leaving *Kuhlmeier* out of the analysis, because no sponsorship or curricular activity was involved, the question is how far *Tinker* goes to protect such student speech as Frederick's, and how far *Fraser* goes to protect school authority to censor and punish student speech that "would undermine the school's basic educational mission."[20] There has to be some limit on the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[21] Had the school in that case defined its mission as instilling patriotic duty or promoting support for national objectives, it still could not have punished the students for wearing the black arm-bands. All sorts of missions are undermined by legitimate and protected speech-a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime*;[22] a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers; and a school's traffic safety mission would be undermined by a student circulating copies of articles

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[20] *Fraser*, 478 U.S. at 685.

[21] *Tinker*, 393 U.S. at 506.

[22] John R. Lott, Jr., *More Guns, Less Crime* (1998).

showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents.[23]

Public schools are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself. What schools are entitled to do, as *Fraser* makes clear, is suppress speech that disrupts the good order necessary to conduct their educational function. No educational function was disrupted by the banner displayed during the Coca-Cola sponsored Olympics event. One can hypothesize off-campus events for which the students might be released that would be educational and curricular in nature and would be disrupted by speech such as Frederick's. For example, on a school field trip as part of the social studies curriculum to observe a court in session, it might be the case that the school could ban the wearing of Cohen's famous jacket.[24] But a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event.

We have no Ninth Circuit authority precisely on point, but what we do have is consistent with the above analysis. In *Burch v. Barker*,[25] we held that a school could not require prior approval for a student newspaper produced outside the school before it was distributed on school grounds to students, distinguishing *Kuhlmeier* because "no one could associate [the newspaper] with school sponsorship or

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[23] *See, e.g.*, Virginia Transportation Research Council, *An Evaluation of Red Light Camera (Photo-Red) Enforcement in Virginia* (2005), http://virginiadot.org/vtrc/main/online-reports/05-r21.htm.

[24] *Cf. Cohen v. California*, 403 U.S. 15 (1971).

[25] *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988). F

endorsement."[26] *Burch* sorts the cases by the "distinction between school-sponsored as opposed to non-school-sponsored expression."[27] The school board and administrators properly control "what is taught," but "no similar content control is justified for communication among students which is not part of the educational program."[28] We held that the school should be enjoined to "purge the plaintiff-students' records of reprimands for violating the policy" of the school,[29] no doubt the source of Frederick's prayer for similar relief in this case.

We again upheld student speech rights in *Chandler v. McMinnville School District*.[30] When replacements were used during a teachers's strike, some students wore buttons calling the replacement teachers "scabs," and were suspended for refusing to take them off. Reversing the district court's dismissal of the student's complaint, we sorted the high school student speech cases in the following manner:

We have discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude, as discussed below, that the standard for reviewing the suppression of

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[26] *Id.* at 1150

[27] *Id.* at 1157

[28] *Id.*

[29] *Id.* at 1159

[30] *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992)

vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by [*Kuhlmeier*], and all other speech by *Tinker*.[31]

Frederick's "Bong Hits 4 Jesus" falls into the third category-the speech controlled by *Tinker*. School officials have broader authority, we held in *LaVine v. Blaine School District*, where they act "not to punish . . . but to avert perceived potential harm."[32] But in Frederick's case, the school officials concede that they acted to punish speech inconsistent with the school's mission, not to avoid potential harm such as the feared school shooting in *LaVine*.

Our sister circuits have similarly held that student speech that is neither plainly offensive nor school-sponsored can be prohibited only where the school district demonstrated a risk of substantial disruption. For example, in *Newsom v. Albemarle County School Board*,[33] the Fourth Circuit addressed a school's ban on clothing depicting, among other images, weapons. *Newsom* had previously been required by an assistant principal to change out of a National Rifle Association T-shirt depicting "men shooting guns," and sought a preliminary injunction to prevent enforcement of the dress code.[34] As in Frederick's case, the school relied on the fact that the T-shirt conflicted with a "message" it was trying

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[31] *Id.* at 529 (citations omitted)

[32] *LaVine v. Blaine School District*, 257 F.3d 981, 983 (9th Cir. 2001).

[33] *Newsom v. Albemarle County School Board*, 354 F.3d 249 (4th Cir. 2003)

[34] *Id.* at 253-54

to impart, namely that "Guns and Schools Don't Mix."[35] The Fourth Circuit straightforwardly applied *Tinker*, distinguished *Fraser* and *Kuhlmeier*, and concluded that, because there was no evidence that clothes showing or mentioning weapons had ever substantially disrupted school operations, the school could not ban this expressive display of speech without impinging on the student's First Amendment rights.[36] The court wryly noted that the school's rigid dress code would prohibit a student from wearing a T-shirt depicting the insignia of a military unit in which a sibling might be serving, or even the official state seal.[37]

Likewise, in *Scott v. School Board of Alachua County*,[38] the Eleventh Circuit upheld suspensions imposed on students for displaying the confederate flag on school premises, where the school board's ban on confederate symbols was premised on the history of racial tension and fights at the school.[39] The Third, Sixth, and Tenth Circuits have similarly applied *Tinker*'s requirement that the speech or symbols to be censored must pose a legitimate likelihood of disruption.[40]

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[35] *Id.* at 252

[36] *Id.* at 260

[37] *Id.*

[38] *Scott v. School Board of Alachua County*, 324 F.3d 1246 (11th Cir. 2003).

[39] *Id.* at 1249.

[40] *West v. Derby Unified School Dist. No. 260*, 206 F.3d 1358, 1366-67 (10th Cir. 2000) (upholding ban on confederate imagery, given past racial tensions and confrontations); *Melton v. Young*, 465 F.2d 1332, 1334-35 (6th Cir. 1972) (same); *see also Sypniewski v. Warren Hills Regional Bd.*

Appendix A

In support of their argument that disciplining Frederick was appropriate, Appellees point to *Boroff v. Van Wert City Board of Education,*[41] a Sixth Circuit case which upheld a high school dress code that was applied to prohibit the wearing of Marilyn Manson T-shirts. The T-shirts contained pro-drug and anti-religious messages and imagery.[42] In *Boroff*, the Sixth Circuit interpreted *Fraser* to grant the school wide-ranging discretion to determine the appropriateness or inappropriateness of certain messages at school. The court concluded that clothing may be banned when it contains "symbols and words that promote values that are[ ] patently contrary to the school's educational mission."[43] We need not pass on whether the clothing ban in *Boroff* could be upheld under our precedent. Nonetheless, to the degree *Boroff* implies that student speech may be prohibited as "plainly offensive" whenever it conflicts with a vaguely-defined "educational mission," we decline to follow it.[44]

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of Educ., 307 F.3d 243, 257 (3rd Cir. 2002) (finding, for the purposes of preliminary injunction, inadequate support for school board's position that T-shirts bearing the term "redneck" posed a "well-founded fear of genuine disruption"); *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001) (remanding for factual determination whether there had been racial incidents related to confederate flags).

[41] *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000).

[42] *Id.* at 469-70.

[43] *Id.* at 470. The school defined its implicated "educational mission" as "to be respectful of others and others' beliefs." *Id.* at 469.

[44] The word "offensive" is not a catch-all to embrace any speech that might offend some hearers. Nor was *Fraser* an invitation to censor and

However, even if we were inclined to adopt *Boroff*, this case is distinguishable in one key respect. *Boroff* sought to wear his T-shirt in the classroom, where its message would be more likely to interfere with the school's core educational mission. Frederick's banner, by comparison, was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials. It most certainly did not interfere with the school's basic educational mission.[45]

We therefore hold that Frederick's punishment for displaying his banner is best reviewed under *Tinker*, rather than *Fraser* or *Kuhlmeier*. *Tinker* requires that, to censor or punish student speech, the school must show a reasonable

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punish any speech that offends school authorities. For example, "scab" is an offensive term, intended to be derogatory, for replacement workers during a strike. Calling replacement teachers "scabs" undermined the school's "mission" to function despite the strike and enable the replacement workers to exercise their authority as teachers and was personally insulting to the replacement teachers. Yet in *McMinnville*, we held that offensiveness in this sense does not take a case from *Tinker* to *Fraser*. By Appellees' standard, distributing photocopies of the Alaska Supreme Court decision in *Ravin v. State*, in which it declared that there is "no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana," 537 P.2d at 511, would also undermine the school's anti-drug mission. However, it could not seriously be contended that handing out copies of *Ravin* on the sidewalk across the street from the school while students were released from classes could be punished. *Fraser* only enables schools to prevent the sort of vulgar, obscene, lewd, or sexual speech that, especially with adolescents, readily promotes disruption and diversion from the *educational curriculum*.

[45] We do not reach the question of whether the school could have prohibited Frederick from displaying his banner on school grounds or wearing a T-shirt that read "Bong Hits 4 Jesus."

concern about the likelihood of substantial disruption to its educational mission. Appellees conceded that the speech in this case was censored only because it conflicted with the school's "mission" of discouraging drug use. That reason fails to meet the bar.

Appellees's conduct violated Frederick's First Amendment rights. Because his speech is protected by the federal constitution, we need not reach the question of whether it is protected by the Alaska Constitution.

We next must address whether, for the purposes of money damages,[46] Appellee Morse is entitled to qualified immunity. The law "provide[s] government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[47] The analysis adopted by the Supreme Court in *Saucier v. Katz* requires that we employ a three-part test to determine whether qualified immunity applies.[48] First, we must determine whether the "facts alleged show [Morse's] conduct violated a constitutional right."[49] Second, we must determine whether the right was clearly established at the time of the

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[46] Qualified immunity does not apply to suits for declaratory or injunctive relief. *See Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993).

[47] *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted).

[48] *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

[49] *Id.*

alleged violation.[50] Finally, we must determine "whether it would be clear to a reasonable [principal] that [her] conduct was unlawful in the situation [she] confronted."[51]

The first question, whether Morse's conduct violated a constitutional right, has been addressed above in detail and answered in the affirmative. We next must determine whether the violated right was clearly established. This inquiry is a pure question of law.[52] Although for a right to be clearly established "[t]he contours of the right must be sufficiently clear that a reasonable [principal] would understand [that] what [she] is doing violates that right," there is no requirement that we identify a prior identical action.[53] Indeed, even if there were not binding precedent in this case, we would be justified in examining a wide range of relevant legal authority, such as the law of other circuits.[54] As we have already shown, the only times other circuit courts have held that conduct like Morse's is not a constitutional violation, they have done so under facts "distinguishable in a fair way from the facts presented in the case at hand."[55] In this case, however, we need not look so far afield, because there exists clear, well-established law of the Supreme Court and of this circuit that governs the panoply of student speech

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[50] *Id.*

[51] *Id.* at 202.

[52] *See Trevino v. Gates*, 99 F.3d 911, 917 (9th Cir. 1996).

[53] *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

[54] *See Elder v. Holloway*, 510 U.S. 510, 512, 516 (1994).

[55] *Saucier*, 533 U.S. at 202.

cases that might face a school principal: the law of *Tinker*, *Fraser*, *Kuhlmeier*, *Burch*, and *McMinnville*.

As we explicitly discussed in *McMinnville*, and also noted *supra*: vulgar, lewd, and obscene speech is governed by *Fraser*, school-sponsored speech is governed by *Kuhlmeier*, and all other student speech is governed by *Tinker*.[56] Under *Tinker*, students retain First Amendment expression rights at school unless authorities reasonably "forecast substantial disruption of or material interference with school activities," which no one contends in this case.[57] Furthermore, Morse readily admits to being aware of the relevant law, indicating that in her "advanced school law" course she studied "*Tinker*, [*Kuhlmeier*], *Bethel*, *Fraser*, all of the pertinent case law related to student rights or . . . related to schools." The law of which Morse was aware clearly established Frederick's constitutional free speech right. In addition, in *McMinnville* we succinctly explained how to apply the various Supreme Court doctrines of which Morse was aware, thus ensuring that opacity in this particular corner of the law has been all but banished.[58] For purposes of the second prong of the *Saucier* qualified immunity test, Frederick's right was clearly established.

The only remaining inquiry, therefore, requires that we determine whether Morse "could . . . have reasonably but mistakenly believed that [ ] her conduct did not violate a clearly established constitutional right."[59] We conclude that

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[56] *McMinnville*, 978 F.2d at 529.

[57] *Tinker*, 393 U.S. at 514.

[58] *McMinnville*, 978 F.2d at 529.

[59] *Saucier*, 533 U.S. at 205.

she could not have. Once we have held that "the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [the official's] conduct."[60] And indeed, even lack of knowledge of the basic constitutional rights would not provide a basis for immunity.[61] This is no case of ignorance. The law was clear, and Morse was aware of it. The law of this circuit has provided explicit directives such that officials may determine which Supreme Court standards govern which types of potential student behavior. No novel question is posed on the basis urged by defendants-that "Bong Hits 4 Jesus" promoted a view contrary to government policy-because the armbands in *Tinker* raised the same concerns. The law of *Tinker*, *Fraser*, *Kuhlmeier*, *Burch*, and *McMinnville* is so clear and well-settled that no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful.[62] In fact, there is nothing in the authorities that justifies what the school did, and no reasonable official could conclude otherwise. Morse fails the third prong of the *Saucier* test.

Thus, having determined that the "facts alleged show [Morse's] conduct violated a constitutional right," that "the right was clearly established," and that "it would be clear to a reasonable [principal] that [her] conduct was unlawful in the

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[60] *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

[61] *See Wood v. Strickland*, 420 U.S. 308, 321-22 (1975).

[62] *See Vance v. Barrett*, 345 F.3d 1083, 1094 (9th Cir. 2003).

situation [she] confronted," we hold that defendant Morse is not entitled to qualified immunity.[63]

The judgment of the district court is VACATED and the case is REMANDED.

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[63] *Saucier*, 533 U.S. at 201-02.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA DATED AND FILED MAY 27, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

JOSEPH FREDERICK,

Plaintiffs,

vs.

DEBORAH MORSE, and
the JUNEAU SCHOOL BOARD,

Defendants.

No. J 02-008 CV (JWS)

ORDER FROM CHAMBERS

[Re: Motions for Summary Judgment - Dockets 13, 14, 18, and 21]

I. NATURE OF THIS ORDER

This order expresses the court's final decision on the motions at dockets 13 and 14, as to which neither party requested oral argument. This order also expresses the court's tentative views on the motions at dockets 18 and 21 to assist the parties in preparing for oral argument. This order does not authorize the filing of additional papers.

Appendix B

II. MOTIONS PRESENTED

At docket 13, defendants Deborah Morse and the Juneau School Board ("Board" or "JSB") (collectively "defendants") move for partial summary judgment to establish that defendants have qualified immunity from claims under 42 U.S.C. § 1983, that defendants are immune from an award of damages under Alaska law, and that the Board is immune from punitive damages in an action under 42 U.S.C. § 1983. At docket 14, defendants also move for partial summary judgment to establish that the Board is immune from punitive damages under Alaska law. Plaintiff Joseph Frederick opposes both motions. At docket 18, Frederick moves for summary judgment on his claims for declaratory and injunctive relief. Defendants oppose the motion and cross-move for summary judgment at docket 21. Frederick opposes the cross-motion. At docket 24, defendants requested oral argument on the motions at dockets 18 and 21. Oral argument will be heard on these motions on June 10, 2003, at 8:00 a.m.[1]

III. BACKGROUND

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska en route to the winter games in Salt Lake City, Utah. The torch bearers ran through Juneau, down Glacier Avenue, passing in front of Juneau-Douglas High School ("JDHS"). Students at JDHS were permitted to

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[1] Defendants specifically limited their request to the cross-motions. Regardless, the request came too late for the motions at dockets 13 and 14. D.Ak. L.R. 7.2 (requiring that oral argument requests be filed within 3 days after the last paper on the motion).

leave their classes to watch the relay from the sidewalk outside the school. Frederick, who was a senior at JDHS at the time, arrived at school late and immediately joined his friends to watch the event, across the street from JDHS. Just as the relay runner and the TV camera crew passed by Frederick and his friends, they held up a large banner containing the phrase "BONG HITS 4 JESUS."

JDHS principal Morse immediately crossed the street and demanded that Frederick and the others put the banner down. Frederick objected. Morse confiscated the banner and ordered Frederick to report to her office. Frederick did not go straight to her office. Instead, he retrieved his books from his car and reported to his class.[2] When he finally did report to Morse's office, he refused to divulge the names of the other students who participated in holding up the banner. Morse suspended Frederick for 10 days. Frederick claims that Morse increased his suspension from 5 days to 10 after he quoted Thomas Jefferson on freedom of expression.

Frederick appealed his suspension to the Superintendent. The Superintendent concluded that Frederick's behavior - displaying a sign that conflicted with the school's mission, defiant and disruptive behavior, and refusal to respond to a staff directive - warranted suspension, but limited it to the time Frederick had already spent out of school before his suspension was held in abeyance pending the appeal.[3]

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[2] The parties disagree about whether Frederick went to Morse's office on his own or was forced to report. Frederick claims that he informed his teacher and then went to the office, while Morse claims she looked up his schedule and had him removed from class.

[3] Superintendant's Decision (Doc. 13, Ex 2). He had already served 8 days of his suspension before it was held in abeyance pending the Superintendent's decision.

Frederick then appealed the suspension to the Board. On March 19,2002, the board upheld the suspension.[4] On April 25, 2002, Frederick filed the instant lawsuit against Morse and the Board in U.S. District Court.[5] His complaint seeks declaratory and injunctive relief, unspecified compensatory damages, and punitive damages for violations of his federal and state constitutional rights to free speech.

IV. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.[6] The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[7] Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[8]

All evidence presented by the non-movant must be believed for purposes of summary judgment, and all

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[4] Minutes of Board Meeting (Doc. 13, Ex. 3).

[5] Doc . 1

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[7] *Id.* at 323-325.

[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

justifiable inferences must be drawn in favor of the non-movant.[9] However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[10]

V. DISCUSSION

A. Qualified Immunity

1. Defendants' Immunity From Damages Under 42 U.S.C. § 1983

Defendants argue that they are immune from suits for damages brought pursuant to 42 U.S.C. § 1983. Government officials performing discretionary functions are entitled to qualified immunity and "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[11] Plaintiff has the burden of overcoming a defendant's claim of qualified immunity by showing that the official violated a clearly established right.[12] A right is clearly established when it would be clear to a reasonable official that the conduct was unlawful under the circumstances, either because there is

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[9] *Id.* At 255.

[10] *Id.* at 248-49.

[11] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[12] *See Conn v. Gabbert*, 526 U.S. 286, 290 (1999). Frederick incorrectly places the burden on defendants.

published case law on point or because the official's actions are so "far fetched" that the illegality is obvious.[13]

Frederick argues that his First Amendment rights are clearly established and that Morse is not entitled to qualified immunity. However, he relies only on the fact that First Amendment law is clearly established. This is not enough. Frederick points to no case law on point showing definitively that Morse could not silence or punish him for what he did. Frederick argues that *Tinker v. Des Moines Independent Community School District*[14] shows that his constitutional rights were clearly established. There, the Supreme Court found that the school's ban on wearing of armbands to protest the Vietnam conflict was a violation of the students' first amendment rights. On the contrary, the more recent decision in *Bethel School District No. 403 v. Fraser*[15] shows that it was objectively reasonable for defendants to believe that their actions were proper.

Morse reasonably believed that she could and should suppress speech that encourages drug use among students in light of the decision in *Fraser* and the Board's policies prohibiting such language. In *Fraser*, the Supreme Court upheld a student's suspension for giving a speech in a school-sponsored assembly that contained what administrators found to be lewd and indecent language. The

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[13] *See Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) (applying standard of reasonable objectiveness); *see also Trevino v. Gates*, 99 F.3d 911, 917 (9th Cir. 1996); *Chew v. Gates*, 27 F.3d 1432, 1450 (9th Cir. 1994).

[14] 393 U.S. 503 (1969).

[15] 478 U.S. 675 (1986).

court in *Fraser* explained that the First Amendment does not prevent school officials from determining that certain language "would undermine the school's basic educational mission."[16] In fact, the court emphasized that it is a "highly appropriate function of public education to prohibit the use of . . . offensive terms in public discourse."[17] Here, Board policies prohibit offensive language, including statements advocating drug use.[18] Moreover, it was reasonable for defendants to believe *Fraser* governed the situation here and not *Tinker* because the expression in *Tinker* did not intrude upon the work of the schools.[19] Here, by contrast, Frederick's expression directly conflicted with the school's deterrence of illegal drug use.

None of Frederick's arguments change this result. The cases he cites either pre-date *Fraser* or are distinguishable, or both.[20] Further, even if the event was not a school-sponsored activity, defendants still did not violate clearly established law if Morse reasonably believed that the statement was

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[16] *Id.* at 685.

[17] *Id.* at 683.

[18] Board Policy No. 5520 (Doc. 21, Att. B, Att. 3, at 1).

[19] *Fraser*, 478 U.S. at 680

[20] *See, e.g., Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673 (9th Cir. 1971) (involving peaceful political expression); *Saunders v. Virginia Polytechnic Inst.*, 417 F.2d 1127, 1130 (4th Cir. 1969) (out-of-circuit pre-*Fraser* case). The remainder involve principles that are not applicable here. *See, e.g., Brandenberg v. Ohio*, 395 US. 444 (1969) (clear and present danger test); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 450 U.S. 37, 45-46 (1983) (public forum); *Hopper v. Pasco*, 241 F.3d 1067, 1074-75 (9th Cir. 2001) (restrictions in limited public forums).

directed at students on campus.[21] Frederick does not argue that defendants' actions were so far-fetched as to make the illegality apparent. Thus, defendants are immune from civil liability for damages stemming from any alleged violation of Frederick's constitutional rights.

b. Immunity Under Alaska law

Defendants also argue that they are immune from an award of damages under Alaska law. In support of this argument, defendants rely on two separate statutory provisions: AS 14.33.140 and AS 09.65.170. AS 14.33.140 provides that:

> [a] teacher, teacher's assistant, a principal, or another person responsible for students is not liable for civil damages resulting from an act or omission (1) arising out of enforcement of an approved school disciplinary and safety program . . . and (2) arising out of and in the course of employment unless the act or omission constitutes gross negligence or reckless or intentional misconduct.

The plain language of this statute provides immunity to both Morse and JSB. Contrary to Frederick's argument, nothing

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[21] *Baker v. Downey City Bd. of Ed.*, 307 F. Supp. 517, 526 (C.D. Cal. 1969) (finding school's ban on distribution of underground newspaper outside school gate of campus did not violate students' First Amendment rights because students were entering campus and "school authorities are responsible for the morals of the students while going to and from school, as well as during the time they are on campus). It is undisputed that the sign was visible from the campus. Declaration of Deborah Morse (Doc. 21, Att. B), ¶ 3 ("Morse Decl.") (explaining that the sign was in "full view and easily readable by students on the high school side of the street").

indicates that it is intended only to protect those with direct responsibility for student discipline and safety. Thus, JSB is also protected by this statute.

Frederick makes a variety of arguments against application of this statute, none of which are convincing. For example, Frederick argues that there is no evidence Morse was acting pursuant to an approved disciplinary plan. However, he presents no evidence demonstrating that there is a factual issue in this regard. Defendants, on the other hand, present admissible evidence that the Board's discipline and safety policies, which were adopted prior to AS 14.33.120, satisfy the statute's requirements[22] and the Superintendent's decision demonstrates that Morse was relying on that plan.[23] Frederick also argues that the evidence thus far could produce a finding of gross negligence or recklessness. However, Frederick never alleged gross negligence or recklessness and fails to offer any specific discussion of facts demonstrating that Morse or JSB acted with gross negligence or recklessness. Accordingly, defendants are both immune from civil liability under Alaska law.[24]

2. Board's Immunity from Punitive Damages

Finally, defendants move for summary judgment on the issue of JSB's immunity from punitive damages as a municipal entity under both federal and state law. Frederick does not dispute that JSB is immune if found to be a unit of

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[22] Morse Decl., ¶ 6

[23] Doc. 13, Ex. 2 (reciting infractions).

[24] Because the court finds defendants are immune under AS 14.33.140, the court will not consider whether the Board is immune under AS 09.65.170.

local government. In fact, he explains that he has no intent of seeking punitive damages against the Board as a government entity. Frederick suggests instead that he may pursue punitive damages against the individual members of the board. However, defendants correctly point out that Frederick did not name the board members in their individual capacity in his suit. Accordingly, this statement is of no consequence.

B. Summary Judgment on Claims for Declaratory and Injunctive Relief

The remaining claims in Frederick's complaint are his claims for declaratory and injunctive relief. Frederick moves for summary judgment on these claims and defendants oppose his motion and cross-move for summary judgment.

1. Whether Frederick's Speech is Protected

Defendants argue that Frederick's rights cannot have been violated because his banner was not protected in the first place. Defendants rely upon Supreme Court decisions concerning conduct and argue that Frederick's conduct in holding up the sign was not protected under the First Amendment because he had no intent to convey a particularized message that was likely to be understood by those who viewed it.[25] Indeed, defendants point to statements by Frederick that the phrase "Bong Hits 4 Jesus"

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[25] Doc. 21 , at 11 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974)).

has no meaning."[26] Nevertheless, those very same documents demonstrate that Frederick had some sort of communicative intent.[27] Accordingly, the fact that Frederick chose an allegedly nonsensical phrase does not mean that his speech is not protected.[28]

2. Suppression of Frederick's Speech under Federal Law

The critical issue, therefore, is whether the school officials were entitled to suppress Frederick's speech and punish him. Frederick argues that under existing Supreme Court precedent, defendants had no right to seize the banner and suspend him. Defendants, on the other hand, argue that existing Supreme Court precedent does permit them to exercise such power over Frederick and that their actions do not violate Frederick's constitutional rights.

a. Exhibition of the Sign

Both parties agree that a central issue is whether the parade-viewing constituted a school-sponsored activity. For

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[26] *E.g.* Deposition of Joseph Frederick (Doc. 21, Ex. K), at 124 ("Frederick Dep."). All page numbers refer to deposition page numbering.

[27] Affidavit of Joseph Frederick (Doc. 18, Ex. A), ¶ 3 (Frederick Aff.") (describing it as a humorous parody and an exhibition of free speech rights); Frederick Dep. at 58 (explaining that he wanted to be controversial), and 60-61 (describing it as an assertion of his first amendment rights).

[28] *See Hurley, et al. v. Irish-American Gay, Lesbian, Bisexual Group*, 515 U.S. 557 (1995). This is not to say, however, that Frederick is correct when he argues that the mere fact he used words means it is "speech" entitled to protection. It is the fact that he was trying to communicate something that makes his conduct expressive.

if it did, there is little doubt that the school has wider discretion to control Frederick's actions. Frederick is undoubtedly correct that students are not without First Amendment rights simply because they enter the school environment. Nevertheless, it is equally clear that the rights of students are not "automatically coextensive with the rights of adults in other settings."[29]

Contrary to Frederick's claim, there is no issue of fact as to whether or not this was a school-sponsored activity. Defendants present admissible evidence that viewing the torch relay was a school-sponsored activity. Morse explains that, believing the event had educational value and significance to the community, she authorized the teachers to take their classes to view the relay.[30] Further, she states that the band and cheerleaders were organized to greet the relay participants, and teachers and administrative officials monitored students' actions.[31] These facts are all indicative of the school-sponsored nature of the activity. In response, Frederick presents affidavits from his classmates stating only that they were not required to stay with their class, and that the entire scene was "chaos."[32] However, these facts do not create an issue of fact because they are not directly contrary to any of defendants' evidence showing that it was school-sponsored. That it constituted a school-sponsored

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[29] *Fraser*, 478 U.S. at 682.

[30] Morse Decl., ¶ 9.

[31] Morse Decl. ¶¶ 9a-b, d-e, 10.

[32] Affidavit of Michael Croteau (Doc. 18, Ex. C); Affidavit of Sara Croteau (Doc. 18, Ex. D); Affidavit of Melinda Madsen (Doc. 18, Ex. E).

activity is further supported by common sense. The relay occurred during school hours, at a time when parents expected their children to be under school supervision.

Frederick argues that, even if it was school sponsored, the fact that he was not in school earlier means he was not a participant in the school-sponsored function. Indeed, the parties agree that Frederick was not in school prior to the event. However, the fact that Frederick joined his fellow classmates at the school-sponsored event meant that he was attending a school-sponsored activity.[33] This is particularly so since Frederick's own statements suggest that he would have been at school prior to the event had his car not gotten stuck in the snow.[34] Thus, Frederick's presence at the event put him under the school's authority.

The fact that Frederick was participating in a school-approved event is significant in dictating the degree to which the school could control the content of his speech or his expressive conduct. The school's authority to control Frederick's exhibition of the sign is established by *Fraser*. Frederick's expression is not like that in *Tinker*. Frederick clearly chose a specific event at which to exhibit his sign, just as *Fraser* chose a specific forum in which to make his speech. But more important, this is not a case like *Tinker* where students chose to make a statement of personal opinion that was unrelated to the school's mission.[35] To the

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[33] It is also shown that Morse did not know that he was not at school prior to the event.

[34] Frederick Aff. ¶ 5.

[35] It appears that even under *Tinker*, the fact that Frederick's sign could be interpreted to advocate illegal drug use justifies the defendants' actions. *See Tinker*, 393 U. S. at 508 (explaining that punishment was not

contrary, Fredericks statements directly contravened the Board's policies relating to drug abuse prevention.

Frederick is incorrect that *Fraser* applies only to lewd and obscene language. In fact, the principle announced in *Fraser* extends further. The court in *Fraser* stated that it is the province of the Board to "determine what manner of speech . . . is inappropriate."[36] The court recognized that certain forms of speech such as, in that case, lewd and obscene speech, might undermine the school's basic educational mission and, therefore, as instruments of the state, they may determine that certain speech does not teach students the boundaries of appropriate social behavior.[37] Finally, later cases have recognized the breadth of *Fraser*.[38] JSB has determined that messages advocating illegal drug use undermine its own mission. The Board has established a variety of policies, including a prohibition on messages

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proper because there was "no evidence of [] interference, actual or nascent, with the school's work"). Without a doubt, part of the school's work is to deter drug and alcohol abuse. Thus, other cases have found that t-shirts expressing inappropriate messages, conflicting with the mission of the school, could be censored without violating the First Amendment. *See, e.g., Boroff v. Van Wert City Bd. of Ed.*, 220 F. 3d 465, 470 (6th Cir. 2000) (concluding school could prohibit t-shirt depicting Marilyn Manson because of the connection with drug-using lifestyle).

[36] 478 U.S. at 683.

[37] *Id.*

[38] *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (stating that it applies to "plainly offensive" speech); *see Boroff*, 220 F.3d at 469.

advocating illegal drug use.[39] Having determined that speech advocating illegal drug use is inappropriate in the school, Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity so as not to place the imprimatur of school approval on the message.[40]

Frederick goes on to argue that, because his message does not clearly advocate illegal drug use, summary judgment is not appropriate. In support, Frederick presents statements from his friends and classmates who assert that they did not understand the message to advocate drug use.[41] Further, Frederick himself claims that he did not intend to communicate any such message.[42] Although this evidence is admissible, these facts are beside the point. There is no requirement that the speaker intend the message as one that violates school policy or that all the students understand it in that fashion. Rather, the determination of an administrator that a particular statement is in violation of school policy is generally not scrutinized so long as the administrator's interpretation is reasonable.[43] The court did not undertake

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[39] Board Policies 1422 (health education), 5511 (dress and grooming), 5520 (disruption an demonstration), and 5530 (chemical use) (attached at doc. 21, Att. B, Atts 1-7)

[40] *See McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 924 (E.D. Mo. 1999).

[41] Doc. 22, Ex. C, ¶ 1; Doc. 22, Ex. D, ¶ 6.

[42] Frederick Aff., ¶ 3.

[43] *Fraser*, 478 U.S. 675 (never considering speaker's intent or students' understanding); *see also, e.g., Pyle by and through Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 170 (D. Mass. 1994) (refusing to second-guess administrator's determination that speech was lewd).

such scrutiny in *Fraser*, where the student's speech was arguably ambiguous.[44] Morse made a determination that the sign advocated drug use. The fact that Frederick admitted that the terms he used, including "bong" and "hit," could be understood to refer to drugs shows that defendants' understanding was reasonable.[45] This case is no different from many others in which the courts have deferred to administrators' judgments.[46]

b. Quotation of Jefferson

Frederick also moves for summary judgment that Morse improperly increased his suspension from 5 to 10 days. In his affidavit, Frederick claims that, upon being told by Morse that he was suspended for 5 days, he quoted Jefferson and that, thereafter, Morse increased his suspension to 10 days for being defiant.[47] Defendants are correct, however, that Frederick fails to establish that he was suspended for 10 days, rather than 5, because of his quotation because his affidavit contradicts his own testimony given at the hearing before the Board held on March 13, 2002. At that hearing, he testified that, after he refused to name everyone involved in holding the sign, Morse "immediately said I would be suspended for even longer for interfering with an

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[44] *Fraser*, 478 U.S. at 687-88 (noting that language was not clearly obscene but nevertheless conceding that the school has the discretion to determine what exceeds permissible limits) (Blackmun, J., dissenting)

[45] Frederick Dep., at 18-19, 70-71.

[46] *See e.g., McCann*, 50 F. Supp.2d at 920, 924 (permitting band from playing "White Rabbit" because that could be perceived to advocate illegal drug use); *Boroff*, 220 F.3d at 469.

[47] Frederick Aff. (Doc. 18, Ex. A), ¶ 10

investigation."[48] He cannot now try to show the facts are established by his declaration.[49] Accordingly, insofar as Frederick seeks summary judgment on this issue, his motion probably should be denied.[50]

3. Suppression of Frederick's Speech under Alaska Law

Count 2 of Frederick's complaint alleges that defendants violated his rights under the Alaska Constitution. Frederick argues that the "compelling needs" test guides the analysis of whether his rights under the Alaska Constitution have been violated. However, he does not meet this burden of demonstrating that the school did not meet the standard because he presents no analysis or supporting evidence that the defendants have failed to meet this test. Accordingly, this branch of Frederick's motion probably should be denied. Defendants' cross motion does not address this claim.

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[48] Transcript (Doc. 21, Ex. I),at 60-61.

[49] *Giovanni v. Sea-Land Serv.*, Inc., __ F. Supp__ , 1997 WL 227897 *6 (N.D. Cal. April 28, 1997), *aff'd* 145 F.3d 1337 (9th Cir. 1998) (disregarding declaration insofar as it contradicted own deposition testimony); *Rodabenko v. Automated Equip. Co.*, 520 F.2d 540, 544 (9th Cir. 1985) (cannot create an issue of fact by contradiction).

[50] Although defendants argue that this factual issue is immaterial, they fail to fully explain why they believe this to be the case. Indeed, this fact is unrelated to whether or not Frederick could be punished for holding up the sign at the parade. However, it is not entirely clear that it could not constitute a separate basis upon which to find his first amendment rights had been violated.

Appendix B

VI. CONCLUSION

For the reasons stated above, defendants' motions for summary judgment at dockets 13 and 14 are GRANTED. Frederick's motion for summary judgment at docket 18 probably should be DENIED and defendants' cross-motion for summary judgment at docket 21 probably should be DENIED in part and GRANTED in part.

DATED at Anchorage, Alaska this 27 day of May, 2003

s/ John W. Sedwick

JOHN W. SEDWICK

UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA DATED AND FILED ON MAY 29, 2003

MINUTES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOSEPH FREDERICK v. DEBORAH MORSE, et al.

THE HONORABLE JOHN W. SEDWICK
CASE NO. J02-0008 CV (JWS)

Deputy Clerk: Pam Richter
Official Recorder: _____

APPEARANCES: for PLAINTIFF: ----
for DEFENDANT: ----

PROCEEDINGS: **ORDER FROM CHAMBERS**

The court issued a preliminary order at docket 29 indicating its tentative view that the plaintiff's motion for summary judgment at docket 18 should be denied and that defendants' motion for summary judgment at docket 21 should be granted. The order was issued to allow the parties to better prepare for oral argument. However, the parties filed a stipulation withdrawing the request for oral argument. The court approved that stipulation in a recent order.

Having carefully considered its preliminary order at docket 29 in light of the parties' briefing, the court concludes that the preliminary order is in all respects correct. Accordingly, for the reasons given in the order at docket 29,

plaintiff's motion for summary judgment at docket 18 is DENIED, and defendants' motion for summary judgment at docket 21 is GRANTED.

The Clerk will please enter judgment that plaintiff take nothing from defendants and that defendants recover their costs from plaintiff.

ENTERED AT JUDGE'S DIRECTION

INITIALS: prr

Deputy Clerk

DATE: May 29, 2003

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA DATED MAY 29, 2003 AND FILED ON MAY 30, 2003

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JOSEPH FREDERICK,

Plaintiff,

v.

DEBORAH MORSE, et al.,

Defendants.

Case Number J02-0008 CV (JWS)

JUDGMENT IN A CIVIL CASE

___ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Appendix D

THAT plaintiff take nothing from defendants and that defendants recover their costs in the amount of $_____ from plaintiff.

APPROVED:

s/ John W. Sedwick

John W. Sedwick

United States District Judge

Date: 5-29-03

Michael D. Hall

Clerk

s/ Patricia Demeter

(By) Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED ON APRIL 18, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH FREDERICK,

Plaintiff-Appellant.

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Defendants - Appellees.

No. 03-35701

D.C. No. CV-02-00008-J-JWS
District of Alaska, Juneau

ORDER

Before: HALL, KLEINFELD, and WARDLAW, *Circuit Judges.*

The panel has voted unanimously to deny the petition for rehearing. Judges Kleinfeld and Wardlaw have voted to deny the petition for rehearing en banc, and Judge Hall has recommended the same.

Appendix E

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX F — SELECTED PROVISIONS OF THE SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT, 20 U.S.C. § 7101 *et seq.*

§ 7102. Purpose

The purpose of this part is to support programs that prevent violence in and around schools; that prevent the illegal use of alcohol, tobacco, and drugs; that involve parents and communities; and that are coordinated with related Federal, State, school, and community efforts and resources to foster a safe and drug-free learning environment that supports student academic achievement, through the provision of Federal assistance to —

(1) States for grants to local educational agencies and consortia of such agencies to establish, operate, and improve local programs of school drug and violence prevention and early intervention;

(2) States for grants to, and contracts with, community-based organizations and public and private entities for programs of drug and violence prevention and early intervention, including community-wide drug and violence prevention planning and organizing activities;

(3) States for development, training, technical assistance, and coordination activities; and

(4) public and private entities to provide technical assistance; conduct training, demonstrations, and evaluation; and to provide supplementary services and community-wide drug and violence prevention planning and organizing activities for the prevention of drug use and violence among students and youth.

* * *

Appendix F

§ 7114. Local educational agency program

* * *

(d) Contents of applications

An application submitted by a local educational agency under this section shall contain —

(1) an assurance that the activities or programs to be funded comply with the principles of effectiveness described in section 7115(a) of this title and foster a safe and drug-free learning environment that supports academic achievement;

(2) a detailed explanation of the local educational agency's comprehensive plan for drug and violence prevention, including a description of —

(A) how the plan will be coordinated with programs under this chapter, and other Federal, State, and local programs for drug and violence prevention, in accordance with section 7846 of this title;

(B) the local educational agency's performance measures for drug and violence prevention programs and activities, that shall consist of —

(i) performance indicators for drug and violence prevention programs and activities; including —

(I) specific reductions in the prevalence of identified risk factors; and

(II) specific increases in the prevalence of protective factors, buffers, or assets if any have been identified; and

(ii) levels of performance for each performance indicator;

(C) how such agency will assess and publicly report progress toward attaining its performance measures;

(D) the drug and violence prevention activity or program to be funded, including how the activity or program will meet the principles of effectiveness described in section 7115(a) of this title, and the means of evaluating such activity or program; and

(E) how the services will be targeted to schools and students with the greatest need;

(3) a description for how the results of the evaluations of the effectiveness of the program will be used to refine, improve, and strengthen the program;

(4) an assurance that funds under this subpart will be used to increase the level of State, local, and other non-Federal funds that would, in the absence of funds under this subpart, be made available for programs and activities authorized under this subpart, and in no case supplant such State, local, and other non-Federal funds;

(5) a description of the mechanisms used to provide effective notice to the community of an intention to submit an application under this subpart;

(6) an assurance that drug and violence prevention programs supported under this subpart convey a clear and consistent message that acts of violence and the illegal use of drugs are wrong and harmful;

(7) an assurance that the applicant has, or the schools to be served have, a plan for keeping schools safe and drug-free that includes —

(A) appropriate and effective school discipline policies that prohibit disorderly conduct, the illegal possession of weapons, and the illegal use, possession,

distribution, and sale of tobacco, alcohol, and other drugs by students;

(B) security procedures at school and while students are on the way to and from school;

(C) prevention activities that are designed to create and maintain safe, disciplined, and drug-free environments;

(D) a crisis management plan for responding to violent or traumatic incidents on school grounds; and

(E) a code of conduct policy for all students that clearly states the responsibilities of students, teachers, and administrators in maintaining a classroom environment that —

(i) allows a teacher to communicate effectively with all students in the class;

(ii) allows all students in the class to learn;

(iii) has consequences that are fair, and developmentally appropriate;

(iv) considers the student and the circumstances of the situation; and

(v) is enforced accordingly;

(8) an assurance that the application and any waiver request under section 7115(a)(3) of this title will be available for public review after submission of the application; and

(9) such other assurances, goals, and objectives identified through scientifically based research that the State may reasonably require in accordance with the purpose of this part.

* * *

Appendix F

§ 7162. Message and materials

(a) "Wrong and harmful" message

Drug and violence prevention programs supported under this part shall convey a clear and consistent message that the illegal use of drugs and acts of violence are wrong and harmful.

* * *

APPENDIX G — SELECTED POLICIES OF THE BOARD OF EDUCATION, JUNEAU SCHOOL DISTRICT, REGARDING STUDENT CONDUCT

BOARD POLICY NO. 5511

DRESS AND GROOMING

The Board of Education recognizes that each student's mode of dress and grooming is a manifestation of the student's personal style and individual preferences. The Board will impose its judgement on students and parents only when a student's dress and grooming affect the educational program of the schools.

Students may not wear clothing or engage in grooming practices that present a health or safety hazard to the individual student or to others; materially interfere with school work, create disorder, or disrupt the educational program; cause excessive wear or damage to school property; or prevent the student from achieving his or her own educational objectives because of blocked vision or restricted movement. Clothing that is sexually provocative or that advertises or advocates the use of illegal drugs, alcohol or tobacco is prohibited as inconsistent with the district's educational mission and disruptive to the district's educational program. Clothing that contains or constitutes speech that would be prohibited under the standards established in Board Policy 5721 for non-school sponsored student publications is also prohibited. The building principals for each level of school shall determine as a group whether the dress or grooming of students comes within these prohibitions.

4 A.A.C.07.010

Adopted 1/8/85

Appendix G

Revised 2/20/96
Revised 5/15/01

* * *

BOARD POLICY NO. 5520

DISRUPTION AND DEMONSTRATION

The Board of Education is responsible for providing a program of education for students in this district and is authorized to preserve order so that the system may function properly. Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program.

The Board will not permit the conduct on school premises of any willful activity engaged in by an individual acting alone or by a group of individuals that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits any assembly or public expression that materially disrupts instruction; is obscene, slanderous, or grossly prejudicial to an ethnic, national, religious, or racial group or to either gender; advocates the use of substances that are illegal to minors; incites violence or urges the violation of law or school rules. Disorderly students will be disciplined in accordance with law and Board policy; staff members who assist students in disorderly conduct may be subject to disciplinary measures.

Appendix G

The Board directs all staff members to attempt to resolve student conflict and dissent by reason and arbitration. Students should be made aware of the lawful procedures available to them for the resolution of their grievances.

The Superintendent shall establish procedures for the prompt resolution of any disruption that occurs on school premises. The building principal shall be responsible for the identification and resolution of disruptions in any school building; he or she may summon law enforcement officers as deemed necessary.

4 A.A.C.07.010

Adopted 1/8/85

Revised 3/1/88

Revised 2/17/98

* * *

BOARD POLICY NO. 5721

DISTRIBUTION OF NON-SCHOOL SPONSORED PUBLICATIONS

The Board of Education respects student rights and encourages students to exercise their right to express themselves in print and in the electronic media and to publish and distribute such materials as part of that expression; at the same time, the Board recognizes that the exercise of that right must be limited by the rights of other members of the school community, and may not substantially interfere with the educational process.

Appendix G

General Provisions and Definitions

Permission to distribute published material does not imply approval of its contents by either the school board or District administrators.

For the purposes of this policy, "published materials" include any written or printed cards, letters, circulars, books, pamphlets, notices, newspapers, and similar materials, in addition to materials that are distributed through the electronic media, including computer, video, or audio presentations.

Distribution of published material in the schools may occur only at the places and during the times established by school rule, in order not to disrupt the orderly operation of the education program. Further, any such material must contain the full and true name of its author(s).

"Distribution" means circulation or dissemination of published material by means of handing out free copies, selling or offering copies for sale and accepting donations for copies. Further, "distribution" includes displaying such material in areas of the school that are generally frequented by students.

In order for published material to be considered disruptive, there must exist specific facts upon which the likelihood of disruption may be determined, including past experience in the school, current events influencing student activities and behavior, or instances of actual or threatened disruption of school operations, relating to the material in question.

Prohibited Materials

The distribution on school premises of the following types of materials is prohibited: materials that;

(a) are seriously prejudicial to any person, any ethnic, national, religious, or racial group, to either gender, or to any person or persons based on sexual orientation;

(b) threaten violence against an individual or group;

(c) invade another person's privacy;

(d) encourage actions which endanger the health or safety of another person;

(e) libel, in the absence of privilege, any person or persons;

(f) advocate the use by minors of any illegal substance or material;

(g) constitute obscenity or contain pervasively vulgar or lewd material deemed to be harmful to impressionable students;

(h) incite violence;

(i) urge the violation of law or school regulations; or,

(j) present a clear and present likelihood that, because of their content or manner of distribution, they will cause a material and substantial disruption of the operation of the school, school activities, or the educational process.

For the distribution of materials described in categories (i) and (j) to be considered a violation of this policy, the distribution must be to a substantial number of students. A "substantial number" of students is defined as ten or more students.

Prior Review of Published Materials

No published materials may be distributed on elementary or middle school premises that have not been submitted to the building principal for review in advance of their distribution. Where the building principal has received the

materials for review and cannot offer reasons, within three school days, why their distribution should be prohibited, the materials may be distributed.

The building principal must offer students an opportunity to remove or modify materials that he or she finds prohibited in accordance with this policy. Any such modified printed material must be resubmitted to the building principal for his or her review. Appeal from the determination of the building principal may be made in accordance with Board policy on student grievance (Policy #5710).

Regulations and Penalties

The superintendent must develop and enforce regulations that govern the time, place and manner of distribution or circulation of published materials on school grounds.

Failure to comply with the requirements of this policy, or administrative regulations promulgated under this policy, will result in confiscation of the offending materials and, as appropriate, disciplinary action against the student(s) who have violated its terms.

4 A.A.C.07.010

Adopted 1/8/85

Revised 3/1/88

Revised 1/19/93

Revised 11/17/98

* * *

Appendix G

BOARD POLICY NO. 5850

SOCIAL EVENTS AND CLASS TRIPS

The Board of Education recognizes the value of social events and class trips that will enhance and enrich the school experience for the students of this district.

The Board will make school facilities available and assign staff members as appropriate for the conduct of social events on school premises and for social events and class trips away from school premises that have been approved by the school administrator.

Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program. Participation in approved social events or class trips is not a right and may be denied to any student who has demonstrated disregard for the school rules.

The Superintendent will develop regulations governing the conduct and safety of all participants in social events and class trips and will distribute them to student and adult participants.

Adopted 1/8/85

APPENDIX H — SUPERINTENDENT'S DECISION ON APPEAL DATED FEBRUARY 25, 2002

TO: Joseph Frederick

From: Gary Bader s/ GMB

Re: Appeal of Suspension

Date: February 25, 2002

Below is my response to your appeal of your suspension. Pursuant to Board Policies 5610 and 5710, copies of which are attached to this decision, you may appeal my decision to the Juneau School District Board of Education by submitting a written appeal to my office, addressed to the school board, within five calendar days of the date you receive this decision.

IN THE MATTER OF THE SUSPENSION OF JOSEPH FREDERICK FROM JUNEAU-DOUGLAS HIGH SCHOOL

Joseph Frederick, a student at Juneau-Douglas High School, was suspended from school for a period of ten days. He was forbidden to come on campus or to participate in school activities during that time, but was permitted to make up missed assignments. According to school records, Joseph was suspended for the following infractions: 2.05 Defiant/Disruptive Behavior, 2.07 Refusal to respond to staff directive regarding behavior, 2.08 Refusal to cooperate/assist in investigation, 2.12 Display of Offensive Material, and 2.17 Truancy/Skipping.

2.12 Display of Offensive Material

Joseph and others were holding a banner bearing the phrase "Bong hits 4 Jesus" on the sidewalk across the street from Juneau-Douglas High School while the Olympic Torch relay passed by. Joseph contends his display of a banner is

protected speech under the First Amendment. He asserts "a students' right to free speech may be abridged only by a showing by the school administration of a compelling need to curtail those rights, based on a credible threat by the student's exercise of free speech to the educational process or public safety." He further asserts that "a school's legal ability to abridge a student's free speech rights is limited to school property and school activities; it does not extend to speech in a public place outside of the classroom." I agree that students do not shed their constitutional rights at the schoolhouse gate. I do not agree, however, that Joseph's description of the applicable legal standard in this situation is correct. The Supreme Court has also said that "the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings' . . . and must be 'applied in light of the special characteristics of the school environment.'" (Justice White's decision in *Hazelwood v. Kuhlmeier*, quoting in part from *Tinker v. Des Moines* and *Bethel v. Fraser*).

Bethel v. Fraser was a case in which the U.S. Supreme Court upheld the right of a school district to discipline a student for making a sexually suggestive speech in a voluntary school assembly. There the Court noted the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's] speech in this case" and stated that the Court in *Tinker* had been careful to note that the case before it there "did 'not concern speech or action that intrudes upon the work of the schools or the rights of other students.'"

In *Bethel* the Court acknowledged that one of the missions of public education is to "inculcate the habits and manners of civility as values" in students. Those values, the Court said, "include tolerance of divergent political and religious views, even when the views expressed may be

unpopular," but they "must also take into account the sensibilities of others" including fellow students. Moreover, the freedom to express unpopular views must be "balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Bethel* teaches that the First Amendment does not require school districts to tolerate student speech that "would undermine the school's basic educational mission."

Joseph's "speech" was to display a banner with the phrase "Bong hits for Jesus." Joseph stated the banner was his. He stated his intended audience was the television camera across the street from where he was displaying his banner. When asked what the phrase meant, Joseph gave inconsistent answers. He told Principal Morse that the phrase was an acronym for "Better Olympic National Games – Head into Town 4 Jesus." When I asked Joseph what the phrase meant, he repeatedly evaded a direct answer. He said the phrase could mean many things. In response to questioning from his attorney, Joseph stated that the phrase was not intended to advocate drug usage or to promote the Christian religion. In his written appeal, Joseph describes the phrase as a common one found on snowboards and snowboard-related materials and asserts that it "may evoke advocacy of legalized marijuana or advocacy of the Christian religion" but that the "precise intent of the phrase does not matter." It does matter, however. Contrary to his assertion, Joseph was not disciplined because the principal of the school "disagreed" with his message, but because his speech appeared to advocate the use of illegal drugs.

The common-sense understanding of the phrase "bong hits" is that it is a reference to a means of smoking marijuana. Given Joseph's inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the

banner as advocating the use of illegal drugs. Joseph's speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. Joseph's speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use.

The Juneau School District has a long-standing policy prohibiting the use of illegal drugs. Speech promoting illegal drug use is specifically prohibited by several board policies. The district teaches abstinence from drug usage as part of its curriculum. The school board has included the promotion of healthy attitudes and behaviors as one of the four strategies of the district's strategic plan. Federal funding for the district is dependent upon the district's pursuit of a drug free environment. The high school offers space to programs that treat young people for substance abuse.

In *Bethel v. Fraser* the Court stated that "Justice Black, dissenting in Tinker made a point that is especially relevant in this case":

> I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.

The principal's act of removing the banner is permissible under the Constitution because Joseph's speech was "speech or action that intrudes upon the work of the schools."

Joseph contends that the school's legal ability to abridge a student's free speech rights is limited to school property

and school activities, and asserts that he was not participating in a school activity. I find that assertion to be incorrect.

Joseph was participating in a school activity attended predominantly by Juneau Douglas High School (JDHS) students. He was standing on or near a public sidewalk across the street from the high school in the midst of students who had been excused from class to watch other students and community members carry the torch in the Olympic Games Torch Relay. The school district expended funds so that other students attending schools that were not on the torch route could bus their students to another location to see the event. The high school band was performing while students waited for the torch to arrive. High school teachers were authorized to allow their students to attend the Torch Relay as a class, provided the students were supervised at all times. The directive from the principal's office was that students were to stay on the sidewalks and out of the street. Students were not restricted to school property to witness the event.

School is generally considered to be the premises where instruction is taking place. However, it is not merely a plot of land. Numerous sporting events, drama productions, and debates are conducted off the premises of the school, but are nevertheless school activities. When the Juneau Douglas High School physical education class runs on Glacier Avenue because there is no athletic field at the school, students are still in school and still under the authority of their teachers and administrators. To find any other way would fly in the face of common sense and popular understanding.

I believe it unreasonable to find that Joseph can stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school. His rights are those of a student at school. I therefore find that Joseph displayed offensive material that was contrary to the mission of the school.

Appendix H

2.17 Truancy/Skipping

According to Joseph, his car had become stuck in a snow bank that morning. Removing it from the snow bank required outside assistance and caused him to be late to school. When he arrived at school, students were assembled on the sidewalk awaiting the passage of the Olympic Torch.

Joseph used poor judgment. He did not attempt to locate his class, nor did he go to the office to report his arrival at school.

Joseph is 18 years old and entitled to excuse his own lateness. He indicated in his remarks to me, which were not contradicted by his principal, that students are routinely admitted to class without an office pass.

It is my finding that after Joseph had overcome the inconvenience of his car being stuck in a snow bank and had arrived downtown, he was skipping class by failing to join his class or otherwise reporting to the office. The fact that he is 18 years old and can write and sign his own letter of explanation does not make his absence excused. However, had any other student come to the school, stayed outside for the activity, and then reported to his next class, it is unlikely that he would have been suspended from school. This will be addressed later.

2.05 Defiant/Disruptive Behavior

Joseph was directed to accompany the principal to her office after she confronted him about the banner he was displaying. Joseph stated that when directed to accompany the principal, he said that he was going to his car to get his books. When given a direction by the principal, it was defiant for Joseph to set his own conditions for compliance. The principal did not agree that Joseph might first go to his car. Joseph did not go to the principal's office; he went to his next class. He did not meet with the principal until

summoned out of class. Principal Morse stated that Joseph displayed a belligerent attitude throughout their meeting.

After Joseph was suspended from school he was instructed to leave the building via the front entrance to the high school. Instead, Joseph walked the entire length of the school to the Marie Drake complex, loudly refusing the directives of the principal. Other students were in the hall to witness Joseph's defiant behavior. While not a basis for the suspension that had previously taken place, Joseph's attitude and behavior after his suspension support the principal's allegation that Joseph displayed a generally defiant attitude in connection with this incident. I find that Joseph did exhibit defiant/disruptive behavior suficient to support discipline by the principal.

2.08 Refusal to Cooperate/Assist in Investigation

When the principal asked Joseph who else was holding the banner, Joseph replied, "he did not know them all." His reply may have been technically truthful, but it was not cooperative.

It appears the Principal and Joseph agree that the refusal of Joseph to tell who else was holding the banner is the basis for citing Joseph for refusal to cooperate/assist in an investigation. Joseph's letter of appeal asserts that "when a person is engaged in a lawful and legally-protected activity -- the exercise of a civil right -- he cannot be required to report the names of others also engaged in lawful activities."

I have found that Joseph's speech was not protected. Nevertheless, from the outset of the event Joseph made reference to First Amendment rights. While I have found that Joseph's speech was not protected, Joseph believed it was. I have not been presented with any information to indicate that other students were asked to identify those who participated in the banner incident. Joseph has admitted it

was his banner and he brought it to school. The principal should not place great weight on this violation of the discipline grid in determining the suspension period for Joseph.

2.07 Refusal to respond to a staff directive regarding behavior

The refusal to respond to a staff directive regarding behavior relates to Joseph's refusal to put the banner down when requested to do so by the principal. Joseph did not surrender the banner when asked to do so. It was only when other students dropped the banner and the principal was joined by Mr. Durand that Joseph surrendered the banner.

Joseph did refuse to respond to a staff directive regarding behavior.

Other

Joseph contends that all of his behavior is excusable because he was exercising his right to free speech. Even if I were to concede his speech across from the high school is protected (which I do not), the remainder of his behavior was not excused. I note that Joseph's behavior was radically different from the behavior of the students in Tinker. They were asked to remove their armbands or not return to school until the armbands were removed. They did not return to school until after the planned period for wearing the armbands had expired.

Joseph's disobeyed the principal's directive at the outset. Joseph refused to surrender the banner when requested. The principal requested him to come to the office to discuss his behavior. He did not. Joseph has a history of defiant behavior and has been suspended from school for defiance before.

Appendix H

Conclusion

Joseph's behavior warranted his suspension from school. Students cannot be permitted to display speech that undermines the school's mission and disrupts school events, argue with their principal, and defy the lawful directives of teachers and school administrators. Suspension of Joseph for these reasons was justified. However, the suspension of Joseph for cutting class would likely not have taken place if Joseph had not been involved in the banner incident. In addition, I believe that Joseph's refusal to cooperate in an investigation should be treated with lenience.

Joseph was suspended from school for ten days. Midway through the suspension the remaining days were held in abeyance pending this appeal. I find that Joseph's suspension should be limited to the time he has already spent out of school and that the days of suspension previously held in abeyance should be removed from his discipline.

APPENDIX I — MINUTES OF THE JUNEAU BOARD OF EDUCATION MEETING OF MARCH 19, 2002

CITY AND BOROUGH OF JUNEAU
BOARD OF EDUCATION

Regular Meeting

Adopted

DATE AND PLACE	Tuesday, March 19, 2002 District Office Board Room
MEMBERS PRESENT	Mary Becker, President Chuck Cohen , Vice-president Carolyn Spalding, Clerk Deana Darnall Daniel Peterson Stan Ridgeway Alan Schorr
MEMBERS ABSENT	None.
STUDENT REPRESENTATIVE	Doug Jones (absent)
ADMINISTRATORS	Gary Bader, Superintendent Peggy Cowan, Assistant Superintendent Zachary Hanna, Business Services Manager Dave Newton, Principal, Auke Bay Elementary School
CALL TO ORDER	The meeting was called to order by Board President Mary Becker at 6:00 pm. in the

Appendix H

	District Office Board Room. Ms. Becker led the flag salute.
EXECUTIVE SESSION	*Carolyn Spalding moved and asked unanimous consent to retire to executive session, to discuss a matter which may tend to prejudice the reputation or character of a person or persons. The matter to be discussed is student suspension* #02-01. (M-2804) - PASSED
RECONVENE	The Board reconvened in regular session at 6:10 p.m.
EXECUTIVE SESSION ACTION – STUDENT # 02-01	*Carolyn Spalding moved and Chuck Cohen seconded the motion that the Board of Education affirm the suspension of Student #02-01 for the reasons given in the Superintendent's decision.* (M-2805) - PASSED

APPENDIX J — PHOTOGRAPH OF FREDERICK'S "BONG HITS 4 JESUS" BANNER

[Photograph from Ninth Circuit record at SER 34.]

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
SEP 27 2006
OFFICE OF THE CLERK

No. 06-278

In The Supreme Court of the United States

JUNEAU SCHOOL BOARD AND DEBORAH MORSE,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 27, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(Restated to conform to the facts found in the decision below).

1. Whether the First Amendment allows public schools to punish students for displaying messages off school property, at events not sponsored by the school or supervised by the school, when a school official deems the message contrary to school policy even though there is no disruption of the educational process.

2. Whether the court of appeals properly denied qualified immunity to a public high school principal who violated clearly-established law under the First Amendment by suspending a student for constitutionally protected speech, off-campus, that Petitioners admit did not disrupt or interfere with school activities.

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COUNTER-STATEMENT OF THE CASE

The actual facts of this case are hard to recognize from Petitioners' statement. On numerous points, they have misstated facts and ignored other critical facts.

This case started when several persons, some students and some not, displayed a banner on a public sidewalk across a street from the high school. App. 2a, 4a; C.A. ER 35, 40, 41. Petitioners erroneously claim that the events took place "on school grounds," Pet. at 5, n.3, but then admit that the banner was unfurled outside school grounds. Pet. at 6. The banner, which read "Bong Hits 4 Jesus," was displayed as the Winter Olympic Torch Relay came along the adjacent street.[1] The relay was a commercially sponsored event sponsored by the local Coca-Cola dealer. The school district was not a sponsor, App. 2a, although the nearby high school had allowed teachers, at their option, to release students from class to watch the relay.[2]

---

[1] Petitioners claim the *persons* holding the banner were all students, Pet. at 6; it was actually a mix of students and non-students. App. 4a; C.A. ER 40. Petitioners claim that the banner was twenty feet long, a fact they admit is not in the record. Pet. at 6. In fact it was fourteen feet long [measurement of original banner by Respondent's counsel].

[2] Petitioners erroneously call the relay a "school sponsored" event. In the trial court, with different counsel, the Petitioners admitted the relay was not sponsored by the school but called student attendance "school sanctioned." Petitioners also erroneously call the event "teacher supervised," but the court of appeals cited uncontradicted evidence that although some teachers were present, there was no real supervision and students were not required to remain with teachers or remain on site; some students simply left campus, contrary to Petitioners' assertion that students were required to remain on campus. App. 4a. No permission slips were required, as would be the case with field trips.

(Continued on following page)

One of the persons holding the banner, 18 year-old Joseph Frederick, was a student at the high school but had not been in school earlier that day. App. 2a, 4a. He arrived at the site where the banner was unfurled without stepping on school grounds. App. 2a. When the banner was unfurled, the high school principal, Deborah Morse, left school grounds, crossed the street, demanded that the people holding the banner put it down, and then grabbed it and crumpled it. App. 2a. Frederick asked about his First Amendment rights, and Morse told him the banner violated school policy against offensive materials. App. 3a.

Morse then told him to come to her office in the high school. Frederick collected his books from his car, checked in with the teacher in his next class to tell him he had to go to the office, and was just going to the office when an assistant principal came to find him.[3] App. 25a; ER 35. Morse suspended Frederick from school for five days. According to Frederick, he then quoted Thomas Jefferson on civil liberties to her, whereupon she gave him an additional five day suspension.[4] App. 3a; C.A. ER 35, 16 (at 108).

App. 12a. Petitioners also claim that Mr. Frederick was participating in an "approved social event." Pet. at 24. In fact, the relay itself was not "approved" by the school, App. 4a; to the extent that Mr. Frederick's presence at the relay could be described as a "social event," it was not one organized by the school. In its opinion, the court of appeals described the event as "school authorized," App. 7a, a phrase that Petitioners do not use. Read in context, however, the phrase "school authorized" simply means that the school "authorized" its teachers to allow their students to attend the privately sponsored event, not that the event was authorized or sponsored by the school.

[3] The School District claims he came only when the assistant principal arrived to get him.

[4] Morse claimed she could not remember whether this happened or not. App. 3a.

In defending its actions, the School District claimed that the banner conveyed a pro-drug message. Mr. Frederick testified otherwise. He explained that the banner was not intended to be a drug reference, but was meant as a meaningless and humorous phrase that might attract the attention of the TV cameras in front of the relay. App. 4a; C.A. ER 35, ER 16 (at 57-59), ER 41. He also presented numerous witnesses who said they did not take it as a pro-drug reference but only as a funny saying.[5] C.A. ER 16 (at 57-59), ER 41. The District admitted that it received no complaints at all from persons taking the banner as referring to drugs and could produce no one who read it as a drug message except the principal.

The court of appeals ultimately found it unnecessary to characterize the banner's message with precision. Even accepting the School District's characterization – despite the absence of supporting evidence in the record – the court of appeals noted that "it is not easy to distinguish speech about marijuana from political speech in the context of a state where referenda regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued." App. 9a.

The Petition also claims, again with no citation to the record, that the principal was confronting a "disruptive" situation. Pet. at 23. In fact, there was some disruption near the school before the banner was unfurled when other students began throwing snowballs and Coke bottles handed out by the relay sponsors, but the people holding

[5] Frederick presented evidence that the phrase was used as a brand slogan on snowboards and as the name of a group that appeared annually at the New Orleans Mardi Gras to parody religious protestors against that event. C.A. ER 35.

the banner were not part of any disruption. App. 2a. The Petitioners do not even claim that the banner display caused disruption. To the contrary, they admitted below that the banner incident caused no disruption in the school's educational program.[6] App. 3a, 6a; C.A. ER 31.

As the lower court correctly noted, "the principal did not rip down the sign at the rally because she anticipated or was concerned about [disruptive] consequences." App. 2a. Rather, the principal's concern was that the banner's message, at least as she construed it, was inconsistent with the school's educational mission. App. 6a. In her mind, that was enough to tear down the banner and suspend Frederick from school, even though the banner was displayed off-campus.

After his ten-day suspension was upheld by the School Board, Frederick filed suit in federal district court, seeking injunctive and monetary relief for a violation of the First Amendment to the U.S. Constitution, as well as for a violation of state civil rights laws. App. 4a. The district court initially dismissed the case, but that ruling was reversed by the court of appeals in a unanimous opinion written by Judge Kleinfeld.

As the court of appeals succinctly summarized its holding: "a school cannot punish students' speech merely because the students advocate a position contrary to government policy." App. 8a. In reaching that conclusion, the court of appeals carefully considered and applied this

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[6] In response to an interrogatory asking how the banner disrupted the work of the school, the school district responded, "Defendants do not contend that display of the banner disrupted classroom work." C.A. ER 31.

Court's decisions in *Tinker v. Des Moines Indep. School District,* 393 U.S. 503 (1969), *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988), and *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986).

Having determined that Respondent's First Amendment rights were violated, the court of appeals then ruled that Petitioner Morse was not entitled to qualified immunity because she either knew or should have known that Respondent's suspension was inconsistent with clearly-established law. App. 19a, 20a. Reconsideration was denied, also unanimously, and a petition for en banc hearing failed to garner a single vote. [Court of Appeals Order, April 18, 2006].

REASONS WHY THE PETITION SHOULD BE DENIED

The petition seeks a writ of *certiorari* based on a factual scenario that is not presented in this case and on a legal issue over which there is no circuit split. Petitioners, who provide a broad survey of student clothing rules limiting advertisements and images related to alcohol, tobacco and other drugs, and who dwell at length on cases involving student clothing, apparently are eager for the Court to make an expansive pronouncement that school districts enjoy great latitude in prohibiting students' "pro-drug" statements while on school grounds.

This case, however, simply does not present that question. Respondent's speech did not occur on campus, did not occur at a school-sponsored event, and did not cause any disruption of the educational process. Based on those actual facts, the holding below is a narrow one, and

fully consistent with this Court's controlling precedents. It is petitioners who seek to change the law based on an idiosyncratic set of facts and without any clearly demonstrated need. This Court should decline that invitation.

1. The facts of this case simply do not present the issues on which petitioners seek certiorari. Petitioners have miscast the facts and ruling below to give the impression that it squarely presents an issue of school authority over drugs. It does not.

a. The events of this case lie at the farthest margin of a school's authority. The facts here bear no resemblance to any of the student speech cases cited by Petitioners and are wholly distinct from circumstances normally faced by school officials. Mr. Frederick, who had not set foot on school grounds, joined with non-students in a location off school property at an event neither sponsored nor meaningfully supervised by the school. Only by conjuring a dramatically different set of facts can Petitioners create an imagined need for review by this Court. Any ruling on these facts will have little practical application beyond this case.

b. It is uncontested that Mr. Frederick was not on campus when the event occurred. And, contrary to Petitioners' artful stretching of the term "sponsored," the court of appeals found that the relay itself was not school sponsored, the Petitioners themselves admitted it below, and there is no dispute that Mr. Frederick's expression was not itself school-sponsored. Despite Petitioners' best efforts to suggest otherwise, this case does not present the issue of school authority over student expressions on campus or in a school-sponsored activity.

c. Even assuming that issue were fairly presented by these facts, which it is not, Petitioners' legal theory has no limits and cannot be reconciled with this Court's nuanced approach to student speech issues. As the court of appeals stated:

> By [Petitioners'] standard, distributing photocopies of the Alaska Supreme Court decision in *Ravin v. State,* in which it declared that there is "no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of marijuana," [citation omitted], would also undermine the school's anti-drug mission. However, it could not seriously be contended that handing out copies of *Ravin* on the sidewalk across the street from the school while students were released from school could be prohibited.

App. at 17a, n.44.

2. There is no conflict among the circuits. Clearly, the Petitioners disagree with the decision below. But there is no basis for their claim that the decision below creates a conflict among the courts of appeals that now requires resolution by this Court.

a. Petitioners cite only a single court of appeals case in which punishment for a display – wearing a t-shirt with a rock band's logo – was sustained merely because the display could be taken as advocating drug use, without a showing of an actual disruptive effect on education, *Boroff v. Van Wert City Board of Education,* 220 F.3d 465 (6th Cir. 2000). However, *Boroff* was substantially limited by a later Sixth Circuit decision, *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001), in which the court found that there must be a showing of actual disruptive effect before a school could ban an arguably racist

t-shirt that offended some students. Moreover, both *Boroff* and *Castorina* involved on-campus activity, which this case does not, a critical distinction that Petitioners consistently obscure.[7]

There are no other appellate decisions that even arguably differ from the decision in this case. The decision below has been cited favorably in two other Ninth Circuit cases, *Pinard v. Clatskanie School District 6J,* 446 F.3d 964 (9th Cir. 2006); and *Harper v. Poway Unified School Dist.*, 445 F.3d 1166 (9th Cir. 2006), and in a recent Second Circuit case, *Guiles v. Marineau*, 2006 WL 2499083, ___ F.3d ___ (2nd Cir. Aug. 30, 2006). There have been no cases critical of the decision below. In addition, numerous courts of appeals cases have adopted the same analysis of student free speech cases that the Ninth Circuit applied here, including *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001). These courts have rejected the notion that a student's expression can be suppressed or punished as "offensive" under *Fraser* merely because it involves a reference to drugs.

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[7] The court of appeals in this case noted that the *Boroff* t-shirt was worn in class, "where its message would be more likely to interfere with the school's core educational mission. Frederick's banner, by comparison, was displayed outside the classroom, across the street from the school, during a non-curricular activity that was at most only partially supervised by school officials. It most certainly did not interfere with the school's basic educational mission." App. at 17a.

b. Petitioners cite several district court cases for the proposition that drug references may be banned in schools, but none referring to off-campus drug references. Among the in-school cases they cited, *Guiles v. Marineau*, 349 F. Supp. 2d 871 (D.Vt. 2004), was reversed, *op. cit.*, and *Barber v. Dearborn Public Schools*, 286 F. Supp. 2d 847 (E.D. Mich. 2003), holds the opposite of what Petitioners claim – it supports punishment of school-sponsored drug references by students under *Fraser* but makes clear that outside of school-sponsored speech, *Tinker* controls and requires a material disruption of classwork or substantial disorder before the speech can be punished, citing *Hazelwood Sch. Dist. v. Kuhlmeier*, *op. cit.* In addition, Petitioners cite *Gano v. School District No. 411*, 674 F. Supp. 796 (D. Idaho 1987) for the holding that t-shirts showing drunken administrators can be punished under *Fraser*, but the depiction at issue in *Gano* was banned not because it fostered alcohol use but because of its false depiction of administrators as drunk on school grounds.

Surprisingly, the Petitioners also cite *McIntire v. Bethel School Board*, 804 F. Supp. 1415 (W.D. Okl. 1992), for the proposition that it is reasonable to link a positive image of alcohol with future school disruptions. In fact, that decision refused to apply *Fraser* and enjoined school officials from banning a t-shirt because they could not show any disruption at the school. The court further held that there is no justification for applying *Fraser* when the only grounds advanced by school officials is that the references to alcohol "are inconsistent with the school's mission of teaching students about the effects of alcoholic beverages . . . and that alcohol consumption by minors is illegal." *Id.* at 1426-1427. In short, *McIntire* directly rejects the Petitioners' main argument here.

3. There is no immediate need to address any issue here. Although Petitioners would have the Court believe that this decision has caused a crisis among schools throughout the nation by disturbing a settled expectation about pre-existing law, nothing could be farther from the truth. Judge Kleinfeld methodically applied long-settled precedent to an uncommon set of facts, arriving at a logical and predictable holding for a situation that seldom arises.

a. The ruling below is consistent with decades of established law. For the past twenty years, school districts, as well as their administrators and students, have operated under this Court's triumvirate of student discipline cases: *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

The court of appeals recognized these three cases, outlined the situations when each applies, and held that *Tinker* covers Frederick's speech. In so holding, the court emphasized that Frederick's speech was conveyed off-campus and was not sponsored by the school (and therefore *Kuhlmeier* did not apply), was not "plainly offensive" (and therefore *Fraser* did not apply), and was not disruptive (and therefore was constitutionally protected under *Tinker*).

b. Few other courts have even noted this decision, and none has ruled contrary to it. As noted above, the opinion has been cited by two other Ninth Circuit panels and more recently by the Second Circuit, but none of these courts has disagreed with the decision or criticized it.

There has been no questioning of the opinion by other judges, let alone direct conflict from other federal courts. There is a good reason for this broad consensus.

> Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood* [*v. Kuhlmeier*], a school may regulate school sponsored speech. . . . Speech falling outside of these categories is subject to *Tinker*'s general rule. . . .[8]

And, *Tinker*'s rule is clear:

> Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school.

393 U.S. at 513.

c. This case arises in a unique factual setting that is not likely to recur: a student who had not been to school that day joined with non-students to display a banner, off school grounds, with a political message utilizing parody, during an event that was not sponsored by the school but which students were allowed to leave school and watch. Such idiosyncratic facts simply do not provide an appropriate vehicle for this Court's review of First Amendment rules that have been well-settled for nearly two decades.

d. Nor is there any other reason that the opinion should be expected to alarm public school districts. Petitioners suggest that many schools have policies on clothing that ban drug, tobacco and alcohol images and

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[8] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.), *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

advertisements. However, Petitioners seriously mischaracterize the breadth of the ruling below and the existing school policies when they claim that schools across the nation have rules that will be put in jeopardy by Judge Kleinfeld's opinion. Indeed, the court of appeals was careful to note that its holding was limited to the particular facts before it. ("We do not reach the question of whether the school could have prohibited Frederick from displaying his banner on school grounds or wearing a t-shirt that read "Bong Hits 4 Jesus.") App. 17a.

At the very least, it is premature for this Court to grant review based on Petitioners' speculation about unforeseen consequences flowing from the decision below that have not materialized and that the court of appeals neither intended nor anticipated.

4. The court of appeals correctly denied qualified immunity based on this Court's well-established jurisprudence. Petitioners' complaint about being denied qualified immunity is result-oriented and not based in fact. Indeed, the court of appeals employed this Court's test for qualified immunity, applied the facts in the record to Supreme Court and court of appeals precedent, and appropriately denied qualified immunity. While Petitioners disagree with the outcome, they do not seriously take issue with the court of appeals' methodology for denying qualified immunity.

a. Judge Kleinfeld's qualified immunity analysis flows from a verbatim quote from *Saucier v. Katz*, 533 U.S. 194 (2001), altering only individual words for application to the facts of the case: "First, we must determine whether the 'facts alleged show [Morse's] conduct violated a constitutional right. Second, we must determine whether the

right was clearly-established at the time of the alleged violation. Finally, we must determine "whether it would be clear to a reasonable [principal] that [her] conduct was unlawful in the situation [she] confronted." App. 18a-19a (quoting *Saucier*, 533 U.S. at 201-02); *see also Lawrence v. Reed*, 406 F.3d 1224, 1230 (10th Cir. 2005) (applying the three-part *Saucier* test); *Limone v. Condon*, 372 F.3d 39, 44 (1st Cir. 2004) (same); *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003) (same).

b. The court of appeals then applied that framework to the facts of this case in straightforward fashion. First, the court held that Frederick's First Amendment rights had been violated when he was suspended from school for off-campus speech in the absence of any evidence that his expression had caused a "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. Second, the court held that the *Tinker* standard was "clearly established" at the time of Frederick's suspension. Finally, the court held that a reasonable principal in Morse's shoes would have understood that Frederick's suspension was unlawful under *Tinker*. None of those holdings is surprising or exceptional.

c. Indeed, Respondent Morse would have been a particularly unlikely individual to receive a shield of qualified immunity. Not only did she admit to being actually aware of *Tinker*, *Fraser*, and *Kuhlmeier* from her graduate school training, App. 20a, but Frederick explicitly referenced his First Amendment rights upon being suspended. App. 3a. Respondent is not aware of any cases where an official received qualified immunity after the official is found to have violated a plaintiff's constitutional right, the official admits she had previously studied the relevant precedent, and the plaintiff had apprised the

official of the constitutional violation at the time of her action. As Judge Kleinfeld recognized, "[t]he law was clear, and Morse was aware of it." App. 21a.

d. Finally, Petitioners' novel claim that they are automatically entitled to qualified immunity based on an initial decision in their favor by the district court that was later reversed by the court of appeals does not warrant review by this Court. If Petitioners were correct, then a grant of qualified immunity could never be reversed, and the district court would effectively become the final decisionmaker on qualified immunity issues. That is plainly not the law.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JUNEAU SCHOOL BOARD; DEBORAH MORSE,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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Seeking to defend the Ninth Circuit's decision, respondent obfuscates the record and paints a misleading portrait of governing law. Although the pertinent facts in this case are straightforward, the law of the First Amendment in the setting of public education is in ever-cascading disarray. As for the record, respondent weaves a web of semantic quibbles, misleading factual characterizations, and record-barren assertions. Much of the caviling deals with disputed issues that both the district court and the Ninth Circuit pointedly determined to be immaterial. Indeed, the Ninth Circuit wholly agreed with Chief Judge Sedwick's bedrock conclusion that "[t]here is no genuine issue of fact material to the decision." App. 6a. Those undisputed findings include:

- "Frederick was a student, and school was in session." App. 6a; *accord* App. 35a.
- The viewing of the Olympic Torch Relay was a "school-authorized activit[y]." App. 7a; *accord* App. 33a-37a.
- District personnel, teachers, and administrators accompanied students at the relay event. App. 3a-4a; *accord* App. 34a.
- The student body, including Frederick, congregated along the street in front of school to watch the relay. App. 2a, 4a-6a; *accord* App. 24a-25a, 29a-30a, 35a.
- Frederick and other students unfurled a banner that "expressed a positive sentiment about marijuana use." App. 6a-7a; *accord* App. 28a-29a, 35a-38a.
- Principal Morse disciplined Frederick for violating the school district's policy against promoting illegal substances. App. 3a; *accord* App. 28a-29a.

When respondent's mosaic of wishful thinking is set aside, as it should be, we are left with a nationally significant ruling of immense practical importance in an arena of the law that is woefully underdeveloped and confused. This Court's review is urgently needed.

I. THIS CASE RAISES VITAL ISSUES OF PRACTICAL IMPORTANCE UNDER THE FIRST AMENDMENT IN THE RECURRING CONTEXT OF STUDENT SPEECH.

Principal Morse, an experienced, respected educator, made a perfectly reasonable, on-the-spot judgment to enforce a commonplace school conduct policy when respondent unfurled his pro-marijuana banner, during school hours, in full view of the student body assembled on and around school grounds to witness the Olympic Torch Ceremony.[1] In this setting, where the Juneau school district sought to have an educational moment outside the classroom, Frederick's pro-drug banner radically changed the focus to a decidedly different subject.

Petitioners consistently have asserted that Frederick's actions — besides disrupting the school activity at hand — disrupted the school's educational mission of maintaining a clear and consistent message that use of illegal substances is wrong and harmful. App. 3a; ER 32. The district court — following the lead of every prior court addressing this issue — rightly determined that this critical educational mission justified Principal Morse's enforcement of the policy against promoting illegal substances. App. 35a-37a.[2] Breaking new jurisprudential ground, the Ninth Circuit concluded that disruption to the educational mission was not enough. App. 18a. The Ninth Circuit's decision reveals a bold — and

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[1] Respondent recasts the banner incident as involving himself and several non-students. *See* Opp'n at 11 (stating he was "joined with non-students to display a banner"). The record evidence only identified one non-student involved in the incident. App. 70a; ER 36, 40, 41.

[2] Prominent former-drug czars from both Democratic and Republican Administrations have joined with several of the nation's leading anti-drug organizations in urging this Court to carefully consider our nation's teen substance abuse problem and the need for schools to enforce policies such as the one enforced by Principal Morse. D.A.R.E. Am. *Amicus* Br.

unwarranted — judicial willingness to second-guess public school educators who operate on the front line.

This case presents an attractive vehicle for shaping the cacophonous body of First Amendment law in the context of school officials seeking to enforce policies against promoting illegal substances. The policies enforced by Principal Morse are similar to policies embraced by countless public school systems across the nation. Such policies apply — as they explicitly did in this case — to student conduct that occurs not only on school grounds but at school-related activities, whether on or off campus.

1. Respondent suggests that standing just off campus grounds during the banner display renders this case "idiosyncratic." This is baseless. School disciplinary rules have never been deemed unenforceable because a school activity moves beyond the precise metes and bounds of school property. *See* 3 James A. Rapp, *Education Law* § 9.03[5][b][i] (2006) ("Authority to discipline students for school related activities extends not only to those occurring on school property but also off school property."). To his credit, respondent does not pretend that this is somehow not a school speech case. Nor could he. Notwithstanding its circumlocution, the Ninth Circuit fully disarms respondent's attempted assault on the foundation of our submission. The Ninth Circuit concluded, simply but decisively: This is a "student speech case," not a "speech on a public sidewalk" case. App. 5a. That is the end of the matter.

So too, respondent attempts to divert attention to whether the relay itself was school-sponsored in an effort to suggest that student viewing of and participation in the event did not constitute a school-sponsored or authorized activity. Opp'n at i, 1-2 & n.2, 6, 11. The district court, however, concluded that "there is no issue of fact as to whether or not this was a school-sponsored activity." App. 34a. The district court alternatively referred to the event as "school-sponsored," "school-approved," and "school-sanctioned." App. 33a-37a.

The Ninth Circuit did not disturb this finding and similarly characterized the event as "school-authorized." App. 7a.[3]

The fact that the Olympic Torch Relay itself may have been supported by private, as well as public, sponsors can in no way mean that the school district's participation in the event ceases to be a school-sponsored activity. Surely, students on school trips to the Fujifilm Giant Panda Habitat at the National Zoo or the Lockheed Martin IMAX Theater at the National Air and Space Museum would still be subject to school jurisdiction despite the presence of corporate monikers and logos.

2. Respondent further claims that the event was not supervised by school personnel. Opp'n at i, 1 n.2. Although the Ninth Circuit characterized the event as "partially supervised," App. 17a, the court in no wise found clear error in the district court's detailed findings:

> [Principal Morse] authorized the teachers to take their classes to view the relay. . . . [T]eachers and administrative officials monitored students' actions. . . . The relay occurred during school hours, at a time when parents expected their children to be under school supervision.

App. 34a-35a; *see* SER 6, 70-80 (declarations detailing supervisory roles of administrators and teachers). Indeed, the court of appeals fully acknowledged that administrators, teachers, and staff were present and that the event occurred

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[3] Without citation, respondent falsely states: "In the trial court, with different counsel, the Petitioners admitted the relay was not sponsored by the school but called student attendance 'school sanctioned.'" Opp'n at 1 n.2. Respondent provides no citation because there is no such "admission." The record in the lower courts is replete with examples of petitioners describing the school's relay participation as "school sponsored." In any event, in this context, the semantic difference between "school-sponsored" and "school-sanctioned" is insignificant.

during the school day. App. 3a-6a. The pivotal point remains, there was still official supervision.[4]

3. Respondent inventively states that "BONG HITS 4 JESUS" contained a "political message." Opp'n at 11. The record and findings are to the contrary. Frederick repeatedly testified that he intended no message whatsoever by the phrase. App. 6a; ER 23, 35; SER 92-93, 109. Nor is a political message reasonably apparent.[5] Frederick instead maintained that the statement was a meaningless publicity stunt. ER 23 ("Q: Were you reaching for some kind of phrase that would be controversial and yet ultimately meaningless? A: Yes."). This belated spin about the banner is of no consequence. The Ninth Circuit's decision is premised on the fact that the banner "expressed a positive sentiment about marijuana use." App. 6a-7a; *see also Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006) (describing Frederick's sign as a "clearly pro-drug banner").

II. THE INSTABILITY AND CONFUSION INFECTING THE LAW OF STUDENT SPEECH HAVE BEEN EXACERBATED IN RECENT WEEKS.

Two days after our petition was filed, the Second Circuit in *Guiles*, *supra*, reversed a district court decision that had fully comported with Chief Judge Sedwick's analysis and instead adopted the Ninth Circuit's destabilizing approach. The Second and Ninth Circuits are now squarely at odds on this important issue with the Fourth and Sixth Circuits. This development further compounds the unenviable dilemma of

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[4] "[P]artially supervised" apparently means that some of the 1,000-plus Juneau Douglas High School students managed to sneak away from the event or were otherwise unruly. App. 4a, 34a.

[5] Marijuana use by minors has always been illegal and has never been part of the political debate in Alaska. And Frederick's audience was a high school student body, nearly all of whom were under 18 years old.

school officials who have lacked this Court's authoritative guidance for two decades.

1. Respondent trumpets the notion that *Frederick* is a narrow decision confined to its Olympian facts. He is wrong. Indeed, *Guiles* puts the lie to this law office pretense. In *Guiles*, the Second Circuit held that a school could not censor specific images of a martini glass, liquor bottles, and lines of cocaine on a student's t-shirt. 461 F.3d at 330. The t-shirt at issue contained an amalgam of images and text criticizing the President and accusing him of being a former substance abuser. The school allowed the student to wear the shirt but told him to cover the drug and alcohol images because such images violated the school's dress code. *Id.* at 321.

Whereas the district court, applying *Fraser*, had upheld the school's editing of the shirt, *see Guiles v. Marineau*, 349 F. Supp. 2d 871, 881 (D. Vt. 2004), the Second Circuit concluded that the school officials could only censor such images if they first satisfied the substantial disruption test under *Tinker*. 461 F.3d at 330. Following *Frederick*'s lead, the Second Circuit adopted a narrow view of *Fraser*'s "plainly offensive" standard. *Guiles* refused to extend *Fraser* — as several other courts have done, *see* Pet. at 15-16 — to the regulation of drug and alcohol images. 461 F.3d at 330.

2. In an exercise in willful blindness, respondent ignores the Fourth Circuit's decision in *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980), which was addressed in the petition and also by *amici*. Pet. at 16; NSBA *Amicus* Br. at 9; D.A.R.E. Am. *Amicus* Br. at 10, 14. In *Williams*, the Fourth Circuit held that a school can prohibit distribution of an underground newspaper that contained advertisements for drug paraphernalia. *Id.* at 1205. Although decided prior to *Fraser* and *Kuhlmeier*, *Williams* did not require school officials to demonstrate that the prohibited material would substantially disrupt school activities. *Id.* at 1205-06.

"[D]isruption," stated the court, "is merely one justification for school authorities to restrain the distribution of a publication; nowhere has it been held to be the sole justification." *Id.* at 1206. Instead of requiring such proof, the court took judicial notice that such messages endanger the health and safety of students and upheld the school's ban of the underground paper. *Id.* at 1205. No court has ever questioned *Williams*. Indeed, it has only been cited with approval, including by other circuits and in cases decided post-*Fraser* and *Kuhlmeier*.[6]

Likewise, in *Boroff*, the Sixth Circuit upheld a school's ban on t-shirts depicting a rock group known for promoting antisocial values such as illegal drug use. 220 F.3d 465, 471 (6th Cir. 2000), *cert. denied*, 532 U.S. 920 (2001). There again, the court did not require the school to prove substantial disruption of the academic program because the t-shirts fell into the category of "plainly offensive" speech under *Fraser*. *Id.* at 469. The court reasoned that *Fraser* gave local school officials wide discretion to regulate speech that is contrary to the basic educational mission of the school. *Id.* at 470. And although *Boroff* was not a unanimous opinion, even the dissent, citing the Fourth Circuit's *Williams* decision, agreed that a school could prohibit pro-drug messages. *Id.* at 472, 474 (Gilman, J., dissenting).

Respondent erroneously asserts that "*Boroff* was substantially limited by a later Sixth Circuit decision, *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001)." Opp'n at 7. But *Castorina* nowhere

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[6] *See, e.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 472 (6th Cir. 2000) (Gilman, J., dissenting); *Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 758 (8th Cir. 1987) (Henley, J., concurring); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747 (5th Cir. 1983); *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 863 (9th Cir. 1982); *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 492 (D.S.C. 1997).

mentions *Boroff*. *Castorina* does not even address the regulation of messages promoting illegal substances; it analyzes the censorship of a Confederate flag t-shirt.[7]

3. Respondent distorts the holdings of several other cases. Respondent claims that four federal appellate decisions "have rejected the notion that a student's expression can be suppressed or punished as 'offensive' under *Fraser* merely because it involves a reference to drugs." Opp'n at 8 (emphasis added) (citing *Newsom*, 354 F.3d at 256; *Castorina*, 246 F.3d 536; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992)). Yet, none of these cases even addresses suppression or punishment of drug references under *Fraser*.

Respondent also fails to distinguish between the outcome of the case and the principle stated. Respondent claims that *Barber v. Dearborn Public Schools*, 286 F. Supp. 2d 847 (E.D. Mich. 2003), "holds the opposite of what Petitioners claim." Opp'n at 9. Petitioners cite *Barber* for the proposition that messages promoting drugs and alcohol may be curtailed under *Fraser*. Pet. at 15. Sure enough, *Barber* states: "*Fraser* is inapplicable as Barber's shirt did not refer to alcohol, drugs, or sex." 286 F. Supp. 2d at 856. If the t-shirt at issue in *Barber* had depicted a "bong" instead of political criticism of the President, the court would have viewed *Fraser* as applicable.

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[7] If there were any lingering doubt that *Boroff* remains fully intact, post-*Castorina* decisions in the Sixth Circuit — and elsewhere — resolve that issue by consistently referring to *Boroff* as a case decided under *Fraser*'s "offensiveness" standard. *See, e.g.*, *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005) (observing that *Boroff* allows a school district to enforce a dress code that bans "offensive illustrations" such as "nihilistic Marilyn Manson T Shirts"). No subsequent decision has recognized a limitation in *Boroff*'s holding.

Similarly, respondent claims that petitioners' citation of *McIntire v. Bethel School Board*, 804 F. Supp. 1415 (W.D. Okla. 1992), "directly rejects the Petitioners' main argument here." Opp'n at 9. But the outcome of *McIntire* boiled down to the school being unable to establish that the message on students' t-shirts — "[t]he best of the night's adventures are reserved for people with nothing planned" — advocated alcohol consumption. The *McIntire* court indeed recognized that *Fraser* — an opinion it described as "oblique at best and certainly less than clear" — offered no aid to the school officials because prohibiting the t-shirts was not "reasonably related to the expressed pedagogical concern of teaching students about the effects of alcoholic beverages and the illegality of consumption of them by minors." *Id.* at 1426-27. *McIntire* actually recognized the breadth of *Fraser*.

III. THE NINTH CIRCUIT'S QUALIFIED IMMUNITY ANALYSIS DEPARTS FROM THIS COURT'S JURISPRUDENCE IN A PROFOUNDLY UNSETTLING MANNER.

As the basis for the purported clearly established right to display a pro-drug banner at a school activity, respondent points only to the general legal principles stated in *Tinker*, *Fraser*, and *Kuhlmeier*. But for almost two decades now, courts have wrestled with the lack of clarity in these general principles, most recently in *Guiles*: "This case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents." 461 F.3d at 321. Reliance on general principles, particularly where the principles are hazy, is insufficient to label a right "clearly established" and deny qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Respondent further argues that Principal Morse, having learned the general principles of *Tinker*, *Fraser*, and *Kuhlmeier* in her academic training almost a decade before the incident, has forfeited any subsequent claim to qualified immunity in a student speech case. This faulty reasoning

only reiterates one of the Ninth Circuit's manifest errors. Ms. Morse's subjective beliefs, however respondent distorts them, are irrelevant in an "objective legal reasonableness" test. *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

Respondent contends that petitioner is simply being "result-oriented." Opp'n at 12. One cannot take lightly the result in this case. A respected and caring educator faces harsh civil liability for carrying out a long-standing school policy. If qualified immunity can be so recklessly tossed aside, as it was in *Frederick*, then the tens of thousands of public school officials who support this petition will find themselves preoccupied with litigation risks when called upon to fulfill their vital role in maintaining school discipline and decorum.

* * *

For the foregoing reasons, this Court should grant the petition for writ of certiorari or summarily reverse.

Respectfully submitted,

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No. 06-278

In the Supreme Court of the United States

JUNEAU SCHOOL BOARD, DEBORAH MORSE, PETITIONERS

v.

JOSEPH FREDERICK, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR D.A.R.E. AMERICA, DRUG FREE AMERICA FOUNDATION, INC. NATIONAL FAMILIES IN ACTION, SAVE OUR SOCIETY FROM DRUGS, HON. WILLIAM J. BENNETT, AND GENERAL BARRY R. MCCAFFREY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The decision below warrants review because the Ninth Circuit's tortured application of the rules governing student speech will severely undermine our schools' ability to protect students from the grave dangers of drug abuse. In holding Principal Morse personally liable for stopping a student from advocating that his classmates engage in illegal drug use, the Ninth Circuit failed even to consider the health and safety concerns underlying policies like the Juneau School Board's, or the magnitude of the drug problem in our schools. But the susceptibility of teens to pro-drug messages is evidenced by the fact that *half* of American secondary school students have used drugs illegally by graduation, often on school property.

The Ninth Circuit's failure to give *any* consideration, much less proper weight, to the school's interest in fighting illegal drug use led it to misapply this Court's student speech decisions. The court's attempt to limit *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), to its facts is particularly troubling: pro-drug messages are every bit as "plainly offensive" to a school's educational mission as are messages containing sexual innuendo. But regardless of the proper balance between expression and the public interest, it simply is not possible for a court properly to evaluate a student's free speech rights without taking into account school authorities' countervailing interests. This Court's intervention is needed to make that clear, before the decision below undermines the ability of school officials to combat illegal drug use by our nation's teens.[1]

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

Amici curiae—consisting of two former directors of the White House Office of National Drug Control Policy and leading national nonprofit organizations dedicated to fighting substance abuse (described more fully in Appendix A)—believe that strong anti-drug policies in our schools are vital to addressing illegal drug use by teens. *Amici* further believe that preventing schools and school officials from prohibiting pro-drug displays under the aegis of the First Amendment not only endangers our children, but it is also inconsistent with settled First Amendment law. School officials bear the weighty responsibility of fighting illegal drugs and sending students a clear message that drug use will not be tolerated. At a minimum, those officials need clear guidance regarding the circumstances when it is constitutional to enforce standard school policies prohibiting students from advocating illegal drug use.

STATEMENT

The Ninth Circuit's decision, if applied nationally, would wreak havoc on anti-drug policies in public schools across the country. Without considering the nature or seriousness of the problems posed by drug use in our schools, the court below held a high school principal personally liable for stopping a student from advocating illegal drug use in the midst of a school event. See Pet. App. 1a-22a.

Standing across from his high school, in the midst of the assembled student body—which had turned out to take part in the Olympic Torch Relay—Joseph Frederick and several of his classmates unfurled a twenty-foot banner reading "BONG HITS 4 JESUS." The principal asked the students to take down the banner because it violated the school district's policy prohibiting messages that advocate the use of illegal drugs. Frederick refused, so Principal Morse confiscated his banner and gave him a ten-day suspension for that and other misconduct. See *id.* at 2a-4a.

The school district superintendent and the Juneau School Board upheld Frederick's suspension (though the superintendent reduced it to time served, which was eight days). *Id.* at 4a. The District Court too held that Principal Morse and the Juneau School Board had not violated Frederick's constitutional rights, and that, in any event, they were protected by qualified immunity. *Ibid.*; see also *id.* at 23a-44a.

The Ninth Circuit reversed, however, holding that the Constitution gives students the right to advocate—during a school event—that their classmates use illegal drugs. As far as the court was concerned, Frederick's message was more like the anti-war armbands in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), than the sexual innuendo running through the nomination speech in *Fraser*. See Pet. App. 8a-9a. In addition, the court held that *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), which recognized the right of school authorities to restrict objectionable content in a school newspaper, was entirely irrelevant because "no sponsorship or curricular activity was involved" in Frederick's display of a 20-foot banner, in front of school property, during a school event, to the student body. Pet. App. 10a-11a.

To make matters worse, notwithstanding the fact that the superintendent, the school board, and Chief Judge Sedwick all agreed that Frederick's conduct was not constitutionally protected, the Ninth Circuit held Principal Morse personally liable because "no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful." *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

Teenage drug abuse is an enormous national problem. It endangers the health and well-being of millions of children and undermines the educational mission of our schools. As we explain below, however, the decision below threatens to make anti-drug policies unenforceable in the

nation's public schools. By requiring a case-by-case evaluation of pro-drug speech, and prohibiting any action unless a message causes an immediate and palpable disturbance, the Ninth Circuit's decision makes it difficult, if not impossible, for schools to address the cumulative effects of pro-drug advocacy. Worse still, because of the Ninth Circuit's delusion that "opacity in this particular corner of the law has been all but banished," Pet. App. 20a, school officials face personal liability if a federal judge disagrees with their assessment of any given situation.

Contrary to the Ninth Circuit's decision, the First Amendment does not require school officials to remain neutral when faced with pro-drug messages in the midst of a school activity. Such speech is "plainly offensive" under this Court's decision in *Fraser*, and schools are entitled to take steps to prohibit it. Moreover, as *Fraser* and several other decisions of this Court recognize, courts must defer to decisions of school officials like those at issue here. And, again contrary to the holding below, they must do so whether the advocacy occurs in "curricular" or "non-curricular" settings.

In sum, this case provides the Court an opportunity to clarify the rules governing student speech cases, and to remind the lower courts that the primary responsibility for regulating our public schools lies with school authorities and local communities, not the federal courts.

ARGUMENT

I. Teenage Drug Abuse Is A Problem Of Enormous Proportions Requiring An Array Of Policy Solutions And The Full Involvement Of School Officials.

The Ninth Circuit's opinion gave no consideration to the particular context in which this case arises or the depth and breadth of teenage drug abuse. In 2005, 2.9 million Americans tried drugs for the first time, and more than half (56%) of those new drug users were under the

age of 18.[2] Twenty-one percent of eighth-graders have used drugs—which means that 6 students in a classroom of 30 children, each about fourteen years old, have already used at least one illicit drug.[3] By tenth grade, another 17% of students have used drugs, bringing the total up to 38%. And "exactly *half* of American secondary school students today have tried an illicit drug by the time they near high school graduation."[4]

Unfortunately the problem is deeper than students experimenting once or twice. Thirty-eight percent of high school seniors have used drugs within the last year, and 23% *within the last month*.[5] Particularly alarming for school officials, 4.5% of high school students reported that they had used marijuana in the last month *on school property*,[6] and 25% reported that drugs had been offered to them (or by them) at school in the past year.[7]

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[2] Substance Abuse & Mental Health Services Admin., *Results from the 2005 National Survey on Drug Use & Health: National Findings* ("*2005 NSDUH*") at 46 (Office of Applied Studies, NSDUH Series H-30, DHHS Pub. No. SMA 06-4194), available at http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5Results.htm.

[3] L.D. Johnston, *et al.*, *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2005* ("*2005 MTF Overview*") at 5 (NIH Pub. No. 06-5882), available at http://www.monitoringthefuture.org/pubs/monographs/overview2005.pdf. Monitoring the Future is an ongoing study of the behavior and attitudes towards drug use of American secondary school students, college students, and young adults. Begun in 1975, the study is funded by research grants from the National Institute on Drug Abuse, which is part of the National Institutes of Health. The 2005 study was conducted by researchers at the University of Michigan's Institute for Social Research.

[4] *Id.* (emphasis added).

[5] *Id.* at 48, 52. The national incidence of marijuana use is 44.8% by twelfth grade. *Id.* at 44.

[6] Centers for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States 2005*, 55 MMWR

In Alaska, the drug problem is particularly severe, and especially with marijuana. Sixty percent of Juneau students have used marijuana by the time they graduate from high school.[8] And, in a 2003 survey of Alaska high school students, 6.5% reported using marijuana on school property within the last thirty days,[9] and 13.1% reported that they had used marijuana for the first time *before* they turned 13.[10]

This Court has recognized the troubling implications of drug use at such an early age:

> "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."

Veronia Sch. Dist. 47J v. *Acton*, 515 U.S. 646, 661-62 (1995) (internal citations and quotation marks omitted).

Surveillance Summaries No. SS-5 at 19 (June 9, 2006), available at http://www.cdc.gov/mmwr/ PDF/SS/SS5505.pdf.

[7] *Id.*

[8] *See* Pet. at 3 (citing Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002).

[9] Alaska Dep't of Health & Social Services and Alaska Dep't of Educ. & Early Development, *Alaska Youth Risk Behavior Survey 2003* at 21, available at http://www.epi.hss.state.ak.us/ pubs/YRBS/2003/YRBS%202003.pdf.

[10] *Id.* at 20.

As the Court noted just four years ago, moreover, "[t]he drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse. . . . [T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 834 (2002).

In the fight against student drug use, norm-reinforcing messages matter. Students are more likely to use drugs if they don't think they are dangerous, and when students' collective perception of the risks of drug use change—for better or for worse—rates of student drug use quickly follow.[11] When it comes to illegal drugs, it is no surprise that a high school senior is more likely to share the attitudes of his peers than those of his parents.[12] At the same time, while they are susceptible to their peers' opinions about drugs, students *do* respond to anti-drug messages from their schools and their parents. Drug and alcohol use is less pervasive among students who report being exposed to drug or alcohol prevention messages at school than it is for those who do not recall being exposed

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[11] *2005 MTF Overview*, *supra* note 3, at 12 (a change in high school students' perception of the risk of marijuana use predicts a change in actual use in subsequent years); *see also* L.D. Johnston, *et al.*, *Monitoring the Future National Survey Results on Drug Use, 1975-2005. Vol. I: Secondary School Students* ("*2005 MTF*") at 391-92, (NIH Pub. No. 06-5883), available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2005.pdf. Student drug use has been on a gradual decline the past several years, though there is an ominous indication in the 2005 data suggesting that this trend may be changing. *See 2005 MTF Overview*, *supra* note 3, at 5 ("The 8th graders have been the first to show turnarounds in illicit drug use: they were the first to show the upturn in use in the early 1990s and the first to show the decline in use after 1996; they now appear to be the first to show an end to the declines observed in recent years.").

[12] *2005 MTF*, *supra* note 11, at 390, 425-27.

to anti-drug messages.[13] And marijuana use in particular is *far* less severe among youths who perceive strong disapproval from their parents.[14]

II. The Decision Below Forces Schools To Tolerate Student Advocacy Of Illegal Drug Use At School Events.

Without so much as considering the scope of teenage drug abuse, the Ninth Circuit concluded that the First Amendment requires a school to tolerate student speech advocating illegal drug use. The court is wrong. Such speech interferes with the school's duty to protect and educate our children, including teaching them "the shared values of a civilized social order," and is "plainly offensive" within the meaning of *Fraser*. See 478 U.S. at 683.

Accordingly, this Court's review is warranted to confirm that courts must defer to a school's decision to prohibit pro-drug speech—or at the very least, consider the interests underlying such policies. School policies prohibiting conduct like Frederick's are an essential part of combating the drug problem facing our schools and our children. Because adolescents are particularly impressionable and susceptible to drug use, a message of tolerance is not acceptable. The Ninth Circuit's ignorance of the student drug use problem, or its willingness to tolerate that problem, should not be allowed to hamstring our school authorities and endanger the health and safety of our children.

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[13] *2005 NSDUH*, *supra* note 2, at 65 (past month use of illicit drugs for youths ages twelve to seventeen, 9.2% vs. 13.2%).

[14] *Id.* at 62 ("Current marijuana use [*i.e.*, within the last 30 days] also was much less prevalent among youths who perceived strong parental disapproval for trying marijuana or hashish once or twice than for those who did not (*4.6 vs. 27.0 percent*).") (emphasis added).

A. Schools Need Not Tolerate Student Speech That Is Plainly Offensive To The Educational Mission.

In holding that the First Amendment gives a student the right to advocate drug use by unfurling a twenty-foot banner reading "BONG HITS 4 JESUS" at a school event, the Ninth Circuit failed to recognize the school's interest in enforcing a zero-tolerance policy for pro-drug student messages. Further, the court violated the fundamental principle running through this Court's student speech cases that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" *Kuhlmeier*, 484 U.S. at 266. If allowed to stand, the decision below threatens to undermine the principle that the First Amendment does not protect "plainly offensive" messages that promote disruption and diversion in our public schools. See *Fraser*, 478 U.S. at 683.

Ignoring these principles, the Ninth Circuit observed that "[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' the way sexual innuendo is." Pet. App. 9a. Not so. Advocating that one's classmates engage in illegal drug use—which is what Principal Morse and the Ninth Circuit believed Frederick's banner was doing, see *id.* at 6a-7a—is *at least* as offensive to the school's educational mission and the health of Frederick's classmates as the phallic metaphor at issue in *Fraser*. In fact, the decision below itself exemplifies the perception that the Juneau School Board policy is designed to combat: that illegal drug use by high school students is no big deal.[15]

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[15] Even if Alaska law were as "complicated" as the Ninth Circuit thought, Pet. App. 6a n.4—and it is not—the "issue of 'illegal' drug use" is *not* complicated under federal law. Cf. *Gonzales* v. *Raich*, 545 U.S. 1 (2005). Frederick has never claimed that he was making a political statement about legalization. Rather, he

To be sure, the Ninth Circuit recognized that *Fraser* permits the restriction of "plainly offensive" speech that prompts disruption of the educational process, particularly for adolescents. See Pet. App. 16a-17a n.44. But the court effectively limited *Fraser* to its facts, holding that it only permits schools to prohibit sexually lewd or vulgar messages. *Id.* at 9a. That was error. This strict cabining of the "offensive" speech category, which the Second Circuit has likewise endorsed, *Guiles* v. *Marineau*, __ F.3d __, No. 05-0327, 2006 WL 2499083, at *7-8 (2d Cir. Aug. 30, 2006), is flatly contrary to the rationale of *Fraser*, and to decisions of the Fourth and Sixth Circuits. See *Boroff* v. *Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000); see also *Williams* v. *Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980) (pre-*Fraser* decision holding that disruption was not necessary for school to ban advertisement encouraging drug use).

Fraser is not about social *sensibilities*; it is about the unique needs and *susceptibilities* of minor students. That is, under *Fraser* the First Amendment permits schools to restrict speech simply because it poses more of a danger to immature students than to mature adults. See *Fraser*, 478 U.S. at 683 ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.").

That is true here. Pro-drug speech is distracting to students. When it comes from their peers, it is the kind of speech that students are likely to heed. If left unanswered by school officials, moreover, such speech may be the *only* speech other students hear. And speech advocating illegal drug use is every bit as harmful to teenagers as sexually suggestive remarks. At a minimum, public school officials are entitled to think so.

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was trying to cause a disturbance and get attention by advocating illegal drug use.

In short, given the threat to teens posed by pro-drug messages, a school official has every right—indeed, an obligation—not to look the other way when a student advocates illegal drug use during a school-sponsored, faculty-supervised event. This Court's intervention is needed to clarify that the First Amendment does not require schools to remain neutral when pro-drug messages are displayed at school functions.

B. A School Official's Decision To Prohibit Pro-Drug Speech Is Entitled To Great Deference From The Courts.

The Ninth Circuit's crabbed reading of *Fraser* and its non-deferential review of Principal Morse's analysis of what constitutes "plainly offensive" speech is also contrary to this Court's repeated admonition that the responsibility for educating our children lies with school officials. The decision below oversteps the limited role that courts ought to play in the administration of public school education. The court's opinion does not even *mention* the deference owed to school board policies and to the decisions of the school officials who apply those policies. If allowed to stand, the decision will send the message that courts, rather than schools, have the exclusive say on what manner of speech is "plainly offensive" to the educational functions of the public schools.

The difference between school authorities and other government instrumentalities escaped the Ninth Circuit's notice. "Public schools," the court wrote, "are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself." Pet. App. 12a. But this simplistic analysis ignores the fact that school authorities act *in loco parentis* and must be permitted enough discretion to fulfill that function. As this Court observed in *Davis Next Friend LaShonda D.* v. *Monroe County Board of Education*, "'the nature of [the State's] power [over public schoolchildren] is custodial and tutelary,

permitting a degree of supervision and control that could not be exercised over free adults.'" 526 U.S. 629, 646 (1999) (quoting *Veronia*, 515 U.S. at 655). Indeed, "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Veronia*, 515 U.S. at 662.

The Court recognized in *Fraser* that school authorities must be allowed "to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." 478 U.S. at 684. The same is true for student speech advocating the use of illegal drugs. This amount of control is essential for our schools to fulfill their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Kuhlmeier*, 484 U.S. at 272 (quoting *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954)); see also *Fraser*, 478 U.S. at 686 ("I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.") (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

Here, had Principal Morse failed to react to Frederick's inappropriate display, she would have foregone an opportunity to teach her students—including Frederick—that they should be law-abiding citizens. And she would have failed to protect her students from further exposure to a harmful message.

As these *amici* know from first-hand experience, the legitimacy of the anti-drug imperative is by now beyond question. Drugs are highly destructive to the learning environment and, as discussed above, social norms are vital to combating drug use, particularly at the high school level. Preventing student drug use—what the decision

below wrongly dismissed as "a vaguely-defined 'educational mission,'" Pet. App. 16a—is embodied in concrete policies in place at most public schools, and in federal anti-drug and educational funding laws. These laws were enacted, and the policies of the Juneau School Board adopted, to deal with the very real and substantial drug problem facing our schools and our children. Review is needed to confirm, once and for all, that these types of interests—and public school officials' assessment of them—are a necessary part of the First Amendment analysis in these types of cases.

III. The Decision Below Is Unworkable In Practice And Threatens To Make Anti-Drug Policies Unenforceable In Our Nation's Public Schools.

The Ninth Circuit's failure to give proper weight to the school's interest in fighting illegal drug use threatens to make anti-drug policies nationwide unenforceable. The sweeping holding—that pro-drug messages are neither offensive nor inherently disruptive—combined with an unworkable disruption standard, and the threat of personal liability for any misstep, will chill enforcement of anti-drug policies far beyond the requirements of the First Amendment. If left unreviewed, the decision below will compromise the ability of our public schools to promote a drug-free environment.

1. The Ninth Circuit utterly failed to grasp the real scope of its decision. The court asserted that it was not necessary to decide whether school officials may prohibit students from wearing pro-drug t-shirts to class. Pet. App. 16a. But the decision effectively does just that—contrary to the Sixth Circuit's decision in *Boroff*—by concluding that pro-drug messages are neither offensive nor inherently disruptive.

Indeed, nothing in the court's rationale keeps it from applying in a biology class or a school hallway. Under the decision below, school officials may not enforce anti-drug

policies anywhere or in any way unless student speech poses an imminent threat of disrupting school activities.

The fact that the Ninth Circuit found no disruption to school activities in this case establishes that the court's standard is completely unworkable. In contrast to *Tinker*, where "the wearing of armbands . . . was entirely divorced from actually or potentially disruptive conduct by those participating in it," 393 U.S. at 505, Frederick's display of the banner here caused an immediate disturbance that Principal Morse was fully justified in stopping. The court's search for an additional disruption beyond the banner itself was unnecessary. As this Court has held, "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513.

Even if the display of the banner was not sufficient *actual* disruption, moreover, schools are not required to tolerate "interference, *actual or nascent*, with the schools' work or of collision with the rights of other students . . . ." *Tinker*, 393 U.S. at 508 (emphasis added). Here, the school's well-founded fear of increased student drug use is ample justification for the school's policy of not tolerating any student speech like Frederick's. The risk of increased drug use makes such advocacy a "material and substantial interference with schoolwork or discipline." *Id.* at 511; see also *Williams*, 622 F.2d at 1205 (concluding that judicial notice should be taken that "encouraging the use of drugs encourages actions which in fact endanger the health or safety of students").

The decision below is unworkable for another reason as well: it threatens to require school officials to evaluate each instance in which a student advocates breaking the law to determine whether *that* particular speech is likely to substantially disrupt the school's educational mission.

This requirement makes it impossible for school officials to adopt and enforce policies to address the cumulative effect of pro-drug messages. If permitting such messages would disrupt the work of schools in educating our children and protecting their health—and these *amici* can attest that it would—then public schools must be allowed to act even where the disruptive effect of a single incident is not palpable. This need could hardly be clearer than it is here, where Frederick's "BONG HITS" banner was at least temporally, and perhaps causally, linked to incidents of pro-drug graffiti in the high school after the Relay.

Worse still, the decision below adopts a totally unworkable standard for determining whether a particular disciplinary measure is appropriate. Here the Ninth Circuit concluded that confiscating Frederick's banner was not necessary because his speech caused no *further* disruption (beyond the pro-drug graffiti, of course). But that is simply because Principal Morse took action immediately, before further disruptions occurred. It cannot be the case that, by taking effective measures to prevent or halt a disruption, a school official proves that the intervention was unnecessary.

Principal Morse was not required to wait for Frederick or one of his classmates to take a "bong hit" before she could confiscate Frederick's banner. Nor was she required to wait and see whether his fellow classmates would start a ruckus. Constitutional rights should not turn on whether a group of teenagers is well-behaved at a given moment—especially when school officials are precluded from predicting what will happen and acting preemptively, and *especially* when (as discussed below) they can be held personally liable for any misstep.

2. The decision below also creates an untenable distinction between activities that are "educational and curricular," and activities that are not. The court wrote, "One can hypothesize off-campus events for which the students might be released that would be educational and

curricular in nature and would be disrupted by school speech such as Frederick's. . . . But a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event." Pet. App. 12a. However, distinguishing school activities in this way conflicts with this Court's understanding of the educational process: "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Fraser*, 478 U.S. at 683. If an activity is school-sponsored and faculty-supervised, it should not matter that it is held across the street from the school and is fun for the students.

In addition, neither the schools nor the courts can fairly administer the Ninth Circuit's line. Schools cannot be expected to determine whether a particular field trip or activity is or is not "curricular." Where do "extra-curricular" events fall? Are the free speech rights of the students in the math club different from those of students on the traveling basketball team? What about student participants as compared to student spectators? Can officials treat a visit to an amusement park the same as a trip to a national monument? If not, is a trip to the zoo more like the park or the monument?

Even if some sort of classification system is conceivable, it makes no sense to require school officials to refrain from enforcing standard school policies if they determine—or fear that a *court* would determine—that an activity is more recreational than educational. Advocating illegal drug use is no less serious because a school-sponsored, faculty-attended event falls on one side or the other of this line.

The impossibility of administering such a distinction is further demonstrated by the Ninth Circuit's treatment of the Olympic Torch Relay, a major international event. Contrary to the court below, Coca Cola's support for that event did not diminish its scholastic value. Corporate

sponsorship is ubiquitous for sporting events and cultural activities of all sorts, from the Olympics, to a city's concerts-in-the-park program.

In all events, overseeing a typology of school-related activities is not the proper role for the courts. This Court has repeatedly stated that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273 (citing cases); see also *Fraser*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); *Bd. of Educ.* v. *Pico*, 457 U.S. 853, 863 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."). As this Court observed in *Tinker*, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 393 U.S. at 507.

The Ninth Circuit's arbitrary isolation of "curricular activities"—not to mention its decision that a newly-proclaimed judicial gestalt is "clearly established" constitutional law—inappropriately shifts authority from school officials to the federal courts. This Court's intervention is needed to remind the lower courts that regulating student conduct is a task for our schools, school officials, and the parents and citizens who operate the school boards, not the federal courts.

3. Perhaps the most startling aspect of the decision below is the court's cavalier assertion that the free speech rights it strained to recognize were "clearly established." Last month, considering a student's right to wear an *anti*-drug t-shirt, the Second Circuit cautiously "sail[ed] into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain

currents." *Guiles*, 2006 WL 2499083, at *1. This caution clearly was warranted.

The Ninth Circuit's opinion, however is not cautious, and its conclusion that "opacity in this particular corner of the law has been all but banished," Pet. App. 20a, is frankly absurd. The Second Circuit in *Guiles* openly acknowledged a "lack of clarity in the Supreme Court's student-speech cases," stating that "the exact contours of what is plainly offensive are not so clear to us as the star Arcturus is on a cloudless night." 2006 WL 2499083, at *6, *11. Judge Kozinski has expressed a similar sentiment, noting that "[r]econciling *Tinker* and *Fraser* is no easy task." *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting).

The incoherence of the standard applied below is particularly threatening to school anti-drug policies because of the Ninth Circuit's decision to impose personal liability on Principal Morse. It is obvious that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). A school official faced with personal liability for misapplying the Ninth Circuit's ill-defined standards will walk on dangerous ground if she prohibits a student, not just from displaying a pro-drug banner at a football game, but from wearing or carrying pro-drug paraphernalia to biology class.

For all these reasons, *amici* urge this Court to grant review to authoritatively address these issues in a sensible manner—a manner that preserves our schools' ability to enforce anti-drug policies and protect the safety of their students.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2006

APPENDIX

APPENDIX A

D.A.R.E. America is a nonprofit organization that supports the drug resistance efforts of communities nationwide. The D.A.R.E. (Drug Abuse Resistance Education) program is a police officer-led series of classroom lessons that teaches children from kindergarten through 12th grade how to resist peer pressure and live productive drug and violence-free lives. The D.A.R.E. program is implemented in 75% of our nation's school districts and more than 43 countries worldwide. D.A.R.E. America provides officer training and student educational materials, and supports the development, implementation, and evaluation of the D.A.R.E. curriculum.

Drug Free America Foundation, Inc. ("DFAF") is a nonprofit drug prevention and policy organization committed to policies and laws that will reduce illegal drug use, drug addiction, drug-related injury, and death. DFAF has formed several divisions to further this goal, including the *International Science and Medical Forum on Drug Abuse*, which reviews current articles and published research and provides the public with scientific knowledge about narcotics in an understandable form; the *Institute on Global Drug Policy*, an alliance of physicians, scientists, attorneys and drug specialists who advocate public policies to curtail the illegal use of alcohol or harmful drugs; and *Students Taking Action Not Drugs*, a DFAF division comprised of college students concerned about drug and alcohol abuse at college campuses who provide information to their peers about the dangers of drugs, and help direct young people into treatment.

National Families in Action is a nonprofit organization whose mission is to help families and communities prevent drug abuse among children by promoting strategies based on science and law. With Wake Forrest University School of Medicine, the organization co-sponsors the Addiction Studies Program for Journalists and the Addiction Studies Program for State Legislatures. In 2003, it began the Parent Corps,

patterned after the Peace Corps, which recruits, trains, employs, and supervises Parent Leaders. Each Parent Leader works out of his or her child's school to educate and mobilize the school's parents into preventing the use of alcohol, tobacco, and illegal drugs among students. In the pilot program, 20 Parent Leaders in 19 schools in nine states have recruited 11,500 members: 6,500 parents in the Parent Corps and 5,000 students in the Youth Corps, founded at the request of students.

Save Our Society From Drugs ("S.O.S.") is a nonprofit organization committed to establishing, encouraging and enabling drug laws and drug policies that reduce illegal drug use and abuse, drug-related injury, and death. S.O.S. has been involved in opposing and educating citizens about state ballot initiatives and legislative measures to legalize drugs.

Hon. William J. Bennett served as United States Secretary of Education from 1985-1988 and he was the first Director of the White House Office of National Drug Control Policy, serving in that post from 1989-1990. Dr. Bennett also served as chairman of the National Endowment for the Humanities from 1981-1985. He has written and edited 16 books, including *The Book of Virtues*, *The Children's Book of Virtues*, and the first of a two-volume history, *America: The Last Best Hope*. Dr. Bennett is also the host of a nationally broadcast radio show, "Bill Bennett's Morning in America."

General Barry R. McCaffrey served as Director of the White House Office of National Drug Control Policy from 1996-2001, a tenure longer than any of his predecessors. He was confirmed for this position by unanimous vote by the U.S. Senate. For this period of public service, General McCaffrey received many honors including: the United States Department of Health and Human Services' Lifetime Achievement Award for Extraordinary Achievements in the Field of Substance Abuse Prevention, the United States Coast Guard

Distinguished Public Service Award, the Norman E. Zinberg Award of the Harvard Medical School, the Federal Law Enforcement Foundation's National Service Award, and the Community Anti-Drug Coalitions of America Lifetime Achievement Award. Prior to serving as the nation's Cabinet Officer for U.S. drug policy, General McCaffrey served in the United States Army for 32 years and retired as a four-star General. At retirement he was the most highly decorated serving General, having been awarded three Purple Heart medals for wounds received in his four combat tours, as well as twice awarded the Distinguished Service Cross, the nation's second highest award for valor. He also twice was awarded the Silver Star for valor.

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No. 06-278

IN THE
SUPREME COURT OF THE UNITED STATES

JUNEAU SCHOOL BOARD; DEBORAH MORSE,
Petitioners,

v.

JOSEPH FREDERICK,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

The National School Board Association and its joint *amicus* respectfully move this Court to grant them leave to file the attached brief *amici curiae* in this case. Petitioners have consented to the filing of this brief. A letter attesting to their consent has been submitted to this Court. Respondents have refused to consent.

The National School Boards Association (NSBA) is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators (AASA), founded in 1865, is a professional organization representing over 14,000 educational leaders across America and in other countries. AASA's mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

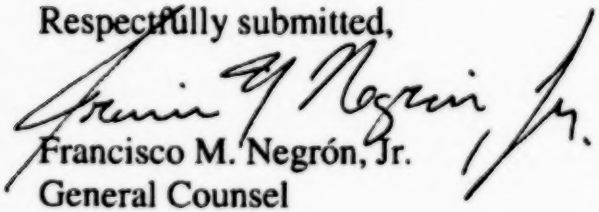
Amici are strongly interested in ensuring that school boards and school administrators have the authority to regulate student speech in situations where students are entrusted to their care and tutelage. Maintaining a positive learning environment while appropriately respecting students' First Amendment rights is crucial to school leaders being able to fulfill their public education mission.

Amici believe that the Ninth Circuit's decision conflicts with First Amendment jurisprudence in other circuits with respect to student expression and aggravates the

already existing legal confusion that school administrators face when seeking to balance the operational needs of their schools to maintain positive learning environments with student free speech rights. If allowed to stand, the decision forces them at the risk of personal liability to endure, during school time at school-sponsored activities with teachers and other students attending, students who choose to openly flaunt the school's authority to maintain a learning environment consistent with its mission of deterring drug and alcohol abuse. This infringes on the authority of school boards and administrators to make and enforce reasonable and appropriate policy decisions for their schools about how to fulfill their educational mission. As the national organizations representing school leaders who adopt policies and oversee the operation of schools, *Amici* are uniquely positioned to advise this Court of the practical effects the Ninth Circuit's decision will have on schools if allowed to stand.

For these reasons, *Amici* request the opportunity to advise this Court on the need for clarity in First Amendment jurisprudence related to student expression.

Respectfully submitted,



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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association (NSBA) is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators (AASA), founded in 1865, is a professional organization representing over 14,000 educational leaders across America and in other countries. AASA's mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

Amici believe that the Ninth Circuit's decision conflicts with First Amendment jurisprudence in other circuits with respect to student expression and aggravates the already existing legal confusion that school administrators face when seeking to balance the operational needs of their schools to maintain positive learning environments with student free speech rights. If allowed to stand, this decision forces administrators—at the risk of personal liability—to tolerate blatant challenges to the school's authority to maintain a learning environment consistent with its mission of deterring drug and alcohol abuse, during school time at school-sponsored activities. This infringes on the authority and curtails the ability of school boards and administrators to

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[1] This brief is submitted on motion to this Court for leave to file. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

make and enforce reasonable and appropriate policy decisions for their schools to fulfill their educational mission.

SUMMARY OF ARGUMENT

This Court should grant review of this case for two primary reasons: (1) to afford critical guidance to school administrators regarding student free speech rights; and (2) to rectify the Ninth Circuit's departure from established qualified immunity principles.

Frederick presents this Court with a critical opportunity to review the scope of student free speech rights in the nation's public schools, which it has not done in 20 years. Granting review will allow the Court to clarify existing jurisprudence, including confusion among federal courts in the following areas: (1) whether a school can define its educational mission to include anti-drug messages; (2) whether a school district can consistently promote and enforce its educational mission in all school authorized and supervised settings, which take place both on and off-campus; (3) whether "plainly offensive" speech under *Fraser* is limited to sexual speech or also encompasses anti-drug and other messages inimical to a school's educational mission; (4) whether *Fraser* applies to manner or to content of student speech, or both; (5) whether *Tinker* establishes a two-prong analysis of student speech, requiring substantial disruption *or* intrusion on the rights of other students, or in all cases demands evidence of substantial disruption even if the speech intrudes on the rights of others; and (6) whether the phrase "Bong Hits 4 Jesus" is speech worthy of First Amendment protection because it is nonsensical.

Despite the lack of clarity in the law as to these questions, *Frederick* imposes a new legal standard on school administrators—that of a lawyer. While school administrators perform a myriad of tasks on a daily basis, they are not lawyers. Instead, they are professional

educators responsible for the orderly operation of our nations' public schools and the education of our children. The Ninth Circuit's decision that a school principal is not entitled to qualified immunity for her decision to disallow a banner reading "Bong Hits 4 Jesus" imposes a new and unreasonably heightened standard that undermines a school administrator's ability to function as a school site leader and to enforce school district policies.

INTRODUCTION

Imagine that you are Principal Deborah Morse. The Juneau School District has charged you with the day-to-day functioning and smooth operation of the Juneau-Douglas High School. In light of the upcoming 2002 Winter Olympics in Salt Lake City, Utah, the Juneau School District decides to allow students at your high school to attend the Olympic Torch Relay. The relay will pass directly in front of your high school and several of your students will serve as torchbearers. This is a significant event in your community and it offers your students a valuable educational experience.

On the day of the relay, your students, teachers, and administrators line-up along the street in front of your school to watch the procession. When the torchbearers approach, several of your students unfurl a 20-foot long banner emblazoned with the phrase "Bong Hits 4 Jesus."

With television cameras bearing down on you, what do you do? Would you do what Principal Morse did, and ask the students to take down the sign?

Each day in America, in approximately 15,000 school districts over 225,000 school administrators, just like Principal Morse, must make quick judgments involving the conflict between student free speech rights and a school district's responsibilities to the entire school community. In order to make this judgment, the student free speech jurisprudence in this country mandates that school

administrators engage in a complicated legal calculus, which includes:

1. What First Amendment standards govern the speech?
2. Does the speech implicate the school district's educational mission?
3. Can the district enforce this particular educational mission?
4. Where did the speech take place?
5. If the speech occurred off-campus, can it be regulated?
6. If *Fraser* applies, does the speech have to be sexual to be considered "plainly offensive?"
7. Does *Fraser* apply to manner or to content of the speech, or both?
8. If *Tinker* applies, does it require a two-prong analysis of the student's speech or only substantial disruption?

This complex analysis must be applied to a huge gamut of student speech ranging from expression of religious views,[2] to racially offensive statements,[3] to violent or threatening messages,[4] to promoting of activities that are

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[2] *E.g., Harper v. Poway Unified Sch. Dist.* 445 F.3d 1166 (9th Cir. 2006) (student T-shirt expressing religious objection to homosexuality); *Bannon v. School Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) (student mural with religious images); *Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (student distribution of holiday gift containing religious message); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) (salutatorian speech containing proselytizing comments).

[3] *E.g., Scott v. School Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003) (display of Confederate flag); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000) (same).

[4] *E.g., Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996) (student threats of violence against school counselor); *Governor Wentworth Regional Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410

illegal or inappropriate for children.[5] Administrators must make these decisions at the risk of a legal challenge,[6] and if the Ninth Circuit is correct, personal liability. The Ninth Circuit's opinion leaves little room for a miscalculation in an administrator's legal analysis even though their actions may be reasonable under the circumstances. Furthermore, the court's refusal to provide Principal Morse with qualified immunity creates an untenable chilling effect on the hundreds of thousands of administrators who are charged with maintaining order and discipline in our schools and with ensuring that students, while in the schools' charge, receive messages that promote the districts' educational goals. It also promotes indecorous behavior by students and detracts from a school district's focus on a positive learning environment.

(D.N.H. 2006) (student wearing "tolerance patch" in threatening environment).

[5] *E.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (student T-shirt promoting anti-social, destructive and inappropriate behavior); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999) (marching band performance of song promoting illegal drug use).

[6] A recent Westlaw search by *Amici* of legal databases containing federal and state cases related to education yielded approximately 800 cases involving student free speech claims since this Court's 1969 decision in *Tinker*. This, of course, represents only the tip of the iceberg of the total number of legal challenges brought asserting free speech violations since it reflects neither claims threatened but never brought nor those resolved without a reported decision.

REASONS FOR GRANTING THE WRIT

I. This Court Should Provide Much Needed Clarification Of Student Free Speech Jurisprudence To Guide Schools In Balancing Students' Free Speech Rights With The Schools' Need To Perform Their Educational Function.

This Court has recognized that the First Amendment free speech rights of students must be balanced against the need of schools to provide a "safe, secure and effective" educational environment. *Tinker v. Des Moines Indep. Community Sch.*, 393 U.S. 503, 507 (1969) (balancing constitutional freedoms of individuals with school's need to perform educational function). *Accord Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1176 (9th Cir. 2006) (balancing free speech rights of students and the "special need to maintain a safe, secure and effective learning environment"). Indeed, student free speech rights "are not automatically coextensive with the rights of adults in other settings, and must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal citations omitted).

This Court's rulings on student expression have resulted in courts tending to place the student speech at issue in one of three categories, each governed by a separate standard, although the speech may not neatly fit in any of them or may reasonably be seen as belonging in more than one. The first category involves school-sponsored speech, which schools may regulate so long as the exercise of such control is reasonably related to "legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. The second category involves "plainly offensive" speech inconsistent with the school's educational mission, *Bethel Sch. Dist. No.*

403 v. Fraser, 478 U.S. 675 (1986) (regulating student assembly speech involving extensive sexual metaphor). Seemingly by default, courts tend to place all other student speech into a third category governed by *Tinker* (school could not regulate students publicizing their objections to the hostilities in Vietnam by wearing black armbands). In *Tinker*, the Court declared a school district may regulate a student's political speech if the speech would "impinge upon the rights of other students," or if the speech would result in "substantial disruption of or material interference with school activities." 393 U.S. at 509, 514.

Because circuit courts differ, often markedly, in their application of *Hazelwood, Fraser* and *Tinker*, the specific contours of the law remain unclear, forcing schools into the difficult task of trying to make some sense of confusing decisions that obscure the proper balance between school authority to maintain an orderly environment conducive to learning and respect for students' free speech rights. The Ninth Circuit's decision only magnifies this lack of clarity in student free speech jurisprudence, while ironically declaring the law clearly established and holding Principal Morse personally liable for failing to recognize the purported clarity. *Amici* urge this Court to accept this case to provide the definitive guidance to school leaders that remains elusive under current law.

A. This Court Should Clarify That School Districts Have The Right To Define And To Enforce Their Educational Mission.

A school district "need not tolerate student speech that is inconsistent with its basic educational mission." *Hazelwood*, 484 U.S. at 266, *quoting Fraser*, 478 U.S. at 685. Courts routinely defer to local school district authority in defining its educational mission, and grant particular deference to school administrators in regulating speech

inconsistent with that mission. *E.g.*, *Poling v. Murphy*, 872 F.2d 757, 761 (6th Cir. 1989) (deferring to decision of local elected school board the question of whether student discipline imposed for derogatory comments was appropriate); *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F.Supp.2d 550, 563 (N.D. Tex. 2004) (school district properly regulated speech inconsistent with school district's "abstinence-only" educational process); *Broussard v. School Bd.*, 801 F.Supp. 1526, 1536 (E.D. Va. 1992) ("The federal courts, ill-suited as they are to second guess decisions of school authorities, should interfere only in the most stringent circumstances") (citations omitted). In fact, this Court has acknowledged that the "determination of what manner of speech in the classroom or in a school assembly is inappropriate properly rests with the school board." *Fraser*, 478 U.S. at 683.

The Ninth Circuit's decision in *Frederick*, however, disregards precedent from this Court and other courts, and circumscribes the manner in which school districts may define and implement their educational mission. In essence, the Ninth Circuit minimizes a school district's legitimate and good faith efforts to enforce anti-drug messages as part of their educational mission by simply concluding that the Juneau School District was "not entitled to suppress speech that undermines whatever missions the school defines for itself." *Frederick v. Morse*, 439 F.3d 1114, 1120 (9th Cir. 2006).

The Ninth Circuit's decision also conflicts with the decisions of other courts granting school districts the right to incorporate anti-drug messages into their educational mission, and to uphold this mission by regulating inconsistent student speech. *E.g.*, *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (upholding under *Fraser* school district's prohibition of Marilyn Manson T-shirts in light of school's dress code prohibiting clothing with offensive illustrations, or drug, alcohol, or tobacco

slogans; principal considered message offensive to the school's basic educational mission by promoting destructive conduct and demoralizing values and mocking a religious figure); *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980) (upholding under *Tinker*, school district's refusal to distribute off campus student newspaper containing advertisement from store selling drug paraphernalia); *Nixon v. Northern Local Sch. Dist.*, 383 F.Supp.2d 965, 971 (S.D. Ohio 2005)(stating that offensive speech under *Fraser* includes speech that promotes suicide, drugs, alcohol or murder); *Gano v. School Dist. No. 411*, 674 F.Supp. 796, 798-99 (D. Idaho 1987) (T-shirt with caricature of school administrators holding liquor and appearing drunk on school property could be regulated).

By imposing restrictions on the right of school districts to establish their own educational mission, including anti-drug messages, and to uphold this mission by regulating inconsistent student speech, the Ninth Circuit apparently sought to prevent what it viewed as unbridled school discretion from swallowing the *Fraser* rule. But in fact, what the court effectively did was to eliminate the rule entirely. Accordingly, this Court should grant review to remove the Ninth Circuit's unwarranted restrictions on a school district's right to define its educational mission.

B. This Court Should Clarify That Schools May Enforce Their Educational Mission In All Settings Where Students Are Entrusted To Their Care And Tutelage.

In an attempt to support its rationale that a school district may not enforce its anti-drug education mission, the Ninth Circuit attempted to distinguish the *Boroff* decision by stating,

> even if we were inclined to adopt *Boroff*, this case is distinguishable in one key respect. Boroff sought to wear his T-shirt in the classroom, where its message would be more likely to interfere with the school's core educational mission. Frederick's banner, by comparison, was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials. It most certainly did not interfere with the school's basic educational mission.

Frederick, 439 F.3d at 1123.

This distinction erroneously equates the educational mission solely with classroom teaching and ignores the reality that today's teaching environment extends to co-curricular and extra-curricular activities occurring outside the classroom walls, such as science camps, museum field trips, Olympic torch relays, school dances, and sporting events. It also suggests a school district may not (or cannot) uphold its educational mission consistently across multiple settings—the football game, the field trip, the classroom, the school supervised activity—all situations where students remain under the custodial care and tutelage of the school.

The Ninth Circuit's ruling if allowed to stand would severely hamper the ability of school officials to maintain safe and orderly environments except in the classroom or during strictly defined curricular activities. Before responding to daily situations involving students outside the classroom or curricular activities, school administrators and teachers would be forced to engage in a detailed, rigorous legal analysis to determine whether under all the circumstances they had the responsibility and the authority to act. Not only is this unworkable because school officials must often react quickly. It is also unworkable because the

legal context in which the duty or authority of school officials to act to protect students in a variety of situations that do not occur on school premises are not always clearly delineated. *Porter v. Ascension Parish School Bd.*, 393 F.3d 608 (5th Cir. 2004) (student disciplined for graphic and violent sketch depicting armed siege of school that was created off-campus and later brought to school.); *Layshock v. Hermitage Sch. Dist.*, 412 F.Supp.2d 502 (W.D. Pa. 2006) (student disciplined for creating an online parody profile of the school's principal on an off-campus computer); *Collins v. Prince William County Sch. Bd.*, 142 Fed.Appx. 144 (4th Cir. 2005) (unpublished) (student expelled under school district policy allowing school officials to discipline students for off-campus offenses). As such, this Court should clarify that schools are entitled to enforce their educational mission and to maintain order in all settings where students are entrusted to their care and tutelage.

C. This Court Should Clarify The Meaning Of "Plainly Offensive" Speech.

Courts are divided on whether this Court in *Fraser* created an exhaustive list of speech that may interfere with a school's educational mission, whether it simply provided guidance on the types of speech that can be regulated, or whether solely addresses sexual speech.

In *Frederick*, the Ninth Circuit limits *Fraser* to those cases involving sexual speech that can result in campus disorder among those "new to adult hormones." *Frederick*, 439 F.3d at 1119. Under *Frederick*, speech must be "'plainly offensive' in the way sexual innuendo is," before it can be regulated. *Frederick*, 439 F.3d at 1119.

The Second Circuit has likewise limited *Fraser* to sexually explicit speech. In the recent decision of *Guiles v. Marineau*, __F. 3d __, 2006 WL 2499083 (2d Cir. Aug. 30, 2006), the Second Circuit narrowly defined *Fraser's* reach to

student speech that is "lewd," "vulgar," "indecent," or "plainly offensive." The Second Circuit equated "plainly offensive" speech with lewd, vulgar and indecent. . .meaning speech, which "connote[s] sexual innuendo or profanity." *Id.* at *7. In sum, *Guiles* held that *Fraser* applies solely to "speech containing sexual innuendo and profanity." *Id.* at *8.

In contrast, other courts have extended the application of "plainly offensive" beyond speech with sexual connotations. *E.g., Boroff*, 220 F.3d 465 (Sixth Circuit upheld ban on T-shirts based on the reasonable view that they promoted anti-social and destructive behavior, demoralizing values and disrespect of the religious views of other students, all of which were contrary to the school's educational mission); *Nixon*, 383 F.Supp.2d 965 (speech promoting suicide, drugs, alcohol, or murder or speech containing vulgar language, or graphic sexual innuendos can be regulated under *Fraser*); *Barber v. Dearborn Pub. Sch.*, 286 F.Supp.2d 847, 859 (E.D. Mich. 2003) (school officials may curtail speech that is lewd, obscene, or vulgar, including speech related to alcohol or drugs); *Broussard*, 801 F.Supp. at 1536 (speech "need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent or offensive is subject to limitation"); *Gano*, 674 F.Supp. 796 (T-shirt with caricature of three school administrators holding liquor and appearing drunk on school property was "clearly offensive").

Based on the inconsistencies among the lower courts, this Court should clarify *Fraser's* scope and expressly indicate whether its "plainly offensive" standard includes more than sexual speech.

D. This Court Should Resolve The Differences Among Federal Courts Regarding Whether *Fraser* Applies To Manner Or To Content Of Student Speech, Or Both.

Federal courts also differ regarding whether *Fraser* permits a school to regulate speech conveyed in a plainly offensive manner, speech that contains content inimical to the school's educational mission, or both. Factually, *Fraser* itself involved school discipline of a student for his "manner of speech," and not the speech's content, 478 U.S. at 682-83, 685, leading some courts to limit the decision's application to the manner of speech. *See, e.g., Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003) ("when speech in school falls within the lewd, vulgar, and plainly offensive rubric, it can be said that *Fraser* limits the form and manner of speech, but does not address the content of the message"); *Nixon,* 383 F.Supp.2d 965, 971 (school district's prohibition of student T-shirt, which stated "Homosexuality is a sin," not justified under *Fraser* standard; court determined *Fraser* and its progeny deal with speech that is offensive due to manner in which it is conveyed); *Broussard*, 801 F.Supp. at 1536 (schools have power to regulate speech presented in lewd, indecent or offensive manner).

However, other courts have emphasized *Fraser*'s underlying rationale of allowing schools to regulate student speech to ensure that they can properly carry out their educational mission. In *Fraser* the Court focused on the school's function in teaching civil discourse. There is no reason that other equally important educational goals should not similarly outweigh the right of students to express messages that impede schools from effectively ensuring that students gain knowledge and skills critical to their development into healthy and productive citizens. This has led some courts to examine the content of the message to

determine whether the *Fraser* standard applies. *E.g.*, *Boroff*, 220 F.3d at 471 (examining content of message to determine ban of T-shirt with a pro-drug message in conflict with the school district's educational message was permissible).

In light of these differing applications of *Fraser*, this Court should accept review to establish a clear standard for determining when and what speech is "plainly offensive."

E. This Court Should Clarify Whether *Tinker* Establishes A Two Prong Analysis Of Student Speech Or Requires Only Substantial Disruption.

This Court in *Tinker* permitted school authorities to regulate student political speech in two circumstances. In the first, a public school can regulate student speech when it results in "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. In the second, a school can proscribe student speech that collides with the rights of other students to be "secure and to be let alone" or that would "impinge upon the rights of other students." *Id.* at 508, 509.

Despite this Court's delineation of two distinct situations justifying regulation of student speech, a number of decisions following *Tinker* have conflated the two prongs and focused exclusively on evidence of substantial disruption. *E.g.*, *Nixon*, 383 F.Supp.2d at 974-75 (requiring a showing of material disruption as evidence of the intrusion on rights of others).

In *Frederick*, the Ninth Circuit likewise limited its analysis to whether the banner at issue disrupted school activities. The court did not determine whether the banner implicated the second prong of *Tinker* and the right of students to be let alone and to be free from derogatory remarks directed at a student's religion. Arguably, the phrase "Bong Hits 4 Jesus" disrespects students with sincerely held Christian religious beliefs, mocks a Christian

religious figure, and trivializes other expressions of faith. Although the school district in this case did not seek to justify its action against Frederick on the basis that his speech interfered with the religious rights of other students, evidence in the record suggests that Frederick recognized that his banner could be regarded as offensive to students of devout Christian faith. Therefore, the Ninth Circuit would have had some basis to address the second prong of *Tinker* but instead engaged in an analysis that inappropriately truncates *Tinker*'s holding into one prong.

Other courts have treated the interference with the rights of others as a separate basis on which the regulation of speech may be justified. For instance, in *Poway,* 445 F.3d 1166, the Ninth Circuit recently ruled that schools could suppress derogatory and injurious remarks directed at a student's minority status such as race, religion, and sexual orientation without a showing of disruption. *Accord West v. Derby Unified Sch. Dist., No. 260,* 206 F.3d 1358, 1366 (10th Cir. 2000) ("display of the Confederate flag might ... interfere with the rights of other students to be secure and let alone").

Poway based its reasoning on this Court's recognition that the "right to be let alone" is "'the right most valued by civilized men.'" *Poway*, 445 F.3d at 1178 (citations omitted). Accordingly, the *Poway* court concluded that the privacy interest in avoiding unwanted communication is most important "'when persons are 'powerless to avoid' it," as in the case of minors subject to mandatory school attendance requirements who are essentially a "'captive audience.'" *Id.* (internal citations omitted).

Due to confusion over the standard established by *Tinker*, this Court should grant review and clearly state whether *Tinker* contains two independent prongs or is limited to speech that causes a substantial disruption, even where the speech encroaches on the right to be left alone.

F. This Court Should Clarify Whether "Bong Hits 4 Jesus" Is Speech Worthy Of First Amendment Protection.

It has been long established that, "[t]he primary concern of the free speech guarantee is that there be full opportunity for expression in all of its varied forms to *convey a desired message*." *Young v. American Mini Theater*, 427 U.S. 50, 76 (1976) (citations omitted) (emphasis added). This fundamental tenet has led courts to protect political, social, and religious speech, but to allow regulation of commercial, disruptive, plainly offensive or nonsensical speech. When speech approaches the nonsensical, it receives less, if any, First Amendment protection, precisely because there is no particular desired message being conveyed. Protecting a student's deliberate attention-seeking display of a nonsensical statement under a free speech analysis would vitiate the First Amendment. This concept was clearly enunciated by the Sixth Circuit in *Salehpour v. University of Tennessee*, 159 F.3d 199, 208 (6th Cir. 1998) *cert. denied*, 526 U.S. 1115 (1999). The court stated,

> [W]e find that, here, Plaintiff's claim fails at the inception where his alleged speech, i.e., his conduct of disrupting the classroom milieu for the sole purpose of advancing and pursuing his admitted power struggle" with the University, was not protected activity.
>
> We cannot convey strongly enough that the purpose of this holding is not to discourage legitimate debate....Indeed, the First Amendment right of freedom of expression of political, social, religious, and other such views may be most precious in an educational setting. However, as in the

> instant case, where the expression appears to have no intellectual content or even discernable purpose, and amounts to nothing more than expression of a personal proclivity designed to disrupt the educational process, such expression is not protected and does violence to the spirit and purpose of the First Amendment.

As in *Salehpour*, Frederick sought to attract attention by displaying at the Olympic torch parade a banner containing words he admitted to be "just nonsense," rendering his teenage publicity stunt designed to garner students their 15-minutes of fame undeserving of First Amendment protection in the first place.

To undertake this inquiry in no way diminishes the reasonableness of Principal Morse's view that the banner displayed a pro-drug message and thus was contrary to school district policy. Not only have courts long deferred to the judgment of school administrators in assessing the meaning and effect of student speech. *See Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) ("In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion."). But also there was evidence that Frederick knew that bong hits referred to smoking marijuana, although he asserted he used the words as nonsense, not to advocate drug use. Where the speaker intends to convey no particularized idea as here, the reasonable, though erroneous, attribution by hearers of a specific viewpoint does not endow the expression with First Amendment protection. In other words, whether the words are deemed nonsense or a pro-drug message, Principal Morse's action in regulating the speech would be constitutionally acceptable. Accordingly, this Court should determine whether "Bong Hits 4 Jesus" is speech worthy of First Amendment protection at all.

II. The Ninth Circuit's Departure From Well-Established Qualified Immunity Principles Denies School Administrators Their Longstanding Authority To Ensure A Positive Learning Environment.

Qualified immunity safeguards "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity also demands that the law be clearly established before its protections may be removed. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Before denying immunity, a court must be satisfied that the right was so clearly established "that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, as the Ninth Circuit has construed this Court's rulings, the "*specific* contours of the law" must be well developed or sufficiently clear. *Rudebusch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002). The immunity inquiry acknowledges that "reasonable mistakes can be made as to the legal constraints on particular [official] conduct. " *Saucier*, 533 U.S. at 205, including mistakes of fact and mistakes of law.

As *Amici* have discussed more fully above, First Amendment student speech jurisprudence is anything but clear, with courts diverging widely in their application of this Court's precedents. The procedural history in this case demonstrates this lack of clarity in the "*specific* contours of the law" and clearly shows that Principal Morse was not "plainly incompetent" and that she did not "knowingly violate the law." In fact, the federal trial judge, applying *Fraser*, ruled that she did not violate the student's First Amendment rights, since a school district is permitted to regulate speech that "might undermine the school's basic educational mission." The Ninth Circuit, however,

determined that Frederick's punishment for displaying his banner was "best reviewed under *Tinker*, rather than *Fraser*" and required the school district to show a "substantial disruption to its educational mission" to justify the discipline. *Frederick*, 439 F.3d at 1123. Even if *arguendo* the Ninth Circuit correctly applied *Tinker* rather than *Fraser* and rightly found that the school district failed to meet the substantial disruption bar, in light of the district court's determination her actions were lawful, Principal Morse's "mistakes" on the law and the facts must be deemed at least reasonable, thus entitling her to qualified immunity.

The Ninth Circuit's determination that Principal Morse should have known that her actions were violating Frederick's clearly established free speech rights not only flies in the face of this Court's qualified immunity doctrine but also is at odds with the determination of other courts that student free speech jurisprudence is "unsettled water. . .rife with rocky shoals and uncertain currents." *Guiles*, 2006 WL 2499083 at *2. In granting qualified immunity to school administrators who disciplined a student for displaying a Confederate flag on school grounds, the Eleventh Circuit stated:

> . . .we cannot conclude that pre-existing law dictates or truly compels the conclusion that the *Tinker* standard should apply in the instant case to the exclusion of the Fraser standard. . . .it would be inappropriate to hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinions.

Denno v. School Bd. of Volusia County, 218 F.3d 1267, 1274 (11th Cir. 2000).

Refusing to grant immunity to school administrators despite the lack of clarity over student free speech rights will likely have the practical effect of discouraging administrators from disciplining students except when student speech causes chaos. This will undermine the ability of schools to maintain discipline and operate according to their mission and is not the result the Supreme Court intended.

CONCLUSION

This Court should grant review to clarify existing student free speech jurisprudence and the application of *Tinker*, *Fraser*, and *Hazelwood*. Qualified immunity demands that the law be clearly established before its protections may be removed. Although the *Tinker-Fraser-Hazelwood* trilogy provides some distilled standards, the contours of student free speech jurisprudence in this nation are unclear. Accordingly, the Ninth Circuit erred in denying Principal Morse qualified immunity. This Court should grant review to rectify the Ninth Circuit's error.

For the foregoing reasons, this Court should grant the petition for writ of certiorari submitted by the Juneau School Board and Deborah Morse.

Respectfully submitted,

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No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
Petitioners,

v.

JOSEPH FREDERICK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 28, 2006
CERTIORARI GRANTED DECEMBER 1, 2006

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I. RELEVANT DOCKET ENTRIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKET NO. 03-35701

JOSEPH FREDERICK,
APPELLANT

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
APPELLEES

RELEVANT DOCKET ENTRIES
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

8/28/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's opening brief is due 10/7/03; appellees' brief is due 11/7/03; appellant's optional reply brief is due 14 days from service of the answering brief. [03-35701] (ld)
10/24/03	Filed original and 15 copies aplt's opening brf (Informal: no) of 38 pages and five excerpts of record in 1 volume; served on 10/21/03. [03-35701] (jr)
10/29/03	Filed original and 15 copies Student Press Law's brief of 30 pages; served on 10/28/03 [03-35701] (sm)

12/8/03	Filed original and 15 copies aples' brf of 52 pages and 5 excerpts of record in 1 vol; served on 12/4/03. Deficient; excerpts need white covers. Notified counsel. [03-35701](jr)
1/8/04	Filed original and 15 copies aplt's rpy brf (Informal: no) of 27 pages; served on 1/5/04. [03-35701] (jr)
5/3/04	CALENDARED: ANCHORAGE July 8, 2004 9:00 AM Courtroom 2, 2nd Floor [03-35701] (rei)
6/10/04	Filed original and 15 copies Drug Policy Alliance's amicus brf of 31 pages. [03-35701] (jr)
6/10/04	Filed original and 15 copies AK School Boards's amicus brf of 33 pages; served on 12/12/03. [03-35701] (jr)
6/10/04	Filed order (Deputy Clerk: hh) motion for aples Deborah Morse and Juneau School Board to strike portions of aplt's excerpts of record is DENIED. [03-35701] (jr)
7/8/04	ARGUED AND SUBMITTED TO Cynthia H. HALL, Andrew J. KLEINFELD, Kim M. WARDLAW [03-35701] (jmr)
3/10/06	FILED OPINION: VACATED and REMANDED. (Terminated on the Merits after Oral Hearing; Remanded; Written, Signed, Published. Cynthia H. HALL; Andrew J. KLEINFELD, author; Kim M. WARDLAW.) FILED AND ENTERED JUDGMENT. [03-35701] (ru)

3/26/06	Filed original and 50 copies aples petition for panel rehearing and petition for rehearing en banc 18 p.pages, served on 3/22/06 PANEL/ACTIVE JUDGES/INTERESTED SENIOR JUDGES [03-35701] (crw)
4/18/06	Filed order (Cynthia H. HALL, Andrew J. KLEINFELD, Kim M. WARDLAW,): The petition for rehearing and the petition for rehearing en banc are DENIED. [5764547-1] [03-35701] (bb)
4/25/06	Filed Deborah Morse, Juneau School Board additional citations, served on 4/21/06 (PANEL) [03-35701] (bb)
4/27/06	MANDATE ISSUED costs taxed against aple for $238.04 [03-35701] (crw)
5/2/06	Filed Appellant Joseph Frederick's application for attorney(s)' fees in the amount of $48,872.00 served on 4/27/06 (PANEL) [5811540] [03-35701] (bb)
7/17/06	Received letter from the Supreme Court dated 7/12/06 re: extension of time to file a petition for a writ of certiorari. [03-35701] (bb)
9/5/06	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 06-278 filed on 8/28/06. [03-35701] (bb)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CIVIL DOCKET NO. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

RELEVANT DOCKET ENTRIES
IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ALASKA

04/25/2002	1-1	Complaint filed.
06/24/2002	7-1	DEF 1-2 Answer to Complaint.
12/02/2002	13-1	DEF 1-2 motion for partial summary judgment re-immunity w/att exhibits and declaration.
12/03/2002	14-1	DEF 1-2 motion for partial summary judgment re immunity from punitive damages under Alaska law.
01/06/2003	16-1	PLF 1 opposition to DEF 1-2 motion for partial summary judgment re immunity. (13-1), DEF 1-2 motion for partial summary judgment re immunity from punitive

		damages under Alaska law (14-1) w/ att exhs.
01/22/2003	18-1	PLF 1 motion for summary judgment as to entitlement to injunctive and declaratory relief w/ att memo and exhs.
01/24/2003	19-1	DEF 1-2 reply to opposition to DEF 1-2 motion for partial summary judgment re immunity (13-1) and DEF 1-2 motion for partial summary judgment re immunity from punitive damages under Alaska law w/ att declarations. (14-1)
02/21/2003	21-1	DEF 1-2 motion [Cross] for summary judgment on the merits;
02/21/2003	21-2	DEF 1-2 opposition to PLF 1 motion for summary judgment as to entitlement to injunctive and declaratory relief w/att memo and exhs. (18-1)
03/12/2003	22-1	PLF 1 opposition to DEF 1-2 motion [Cross] for summary judgment on the merits w/att exhs; (21-1)
03/12/2003	22-2	PLF 1 reply to opposition to PLF 1 motion for summary judgment as to entitlement to injunctive and declaratory relief w/att exhs. (18-1)

03/28/2003	23-1	DEF 1-2 reply to opposition to DEF 1-2 motion [Cross] for summary judgment on the merits (21-1) w/ att exhs.
03/28/2003	24-1	DEF 1-2 Request for Oral Argument re: PLF 1 mot for sj as to entitlement to injunctive and declaratory relief (18-1), DEF 1-2 cross-mot for sj on the merits (21-1).
05/12/2003	28-1	DEF 1-2 Stipulation withdrawing request for oral argument.
05/12/2003	28-2	Clerk's Notice approving stip w/drwing req for o/a (28-1).
05/27/2003	29-1	JWS Order granting motion for partial summary judgment re immunity (13-1), motion for partial summary judgment re immunity from punitive damages (14-1); plf's mot at #18 probably should be denied & defs' x-mot for SJ at #21 probably should be denied in part & granted in part. cc: cnsl
05/29/2003	30-1	JWS Minute Order approving stip w/drwing req for o/a; 6/10/03 o/a at Anchorage is vacated. cc: cnsl
05/29/2003	31-1	JWS Minute Order denying mot for sj as to entitlement to injunctive and declaratory (18-1); granting mot [cross] for sj on the merits (21-1). cc: cnsl

05/30/2003	32-1	JWS Judgment that plf take nothing from defs and that defs recover their costs from plaintiff. cc: cnsl, O&J file
05/30/2003	32	JUDGMENT that plaintiff take nothing from defendants and that defendants recover their costs from plaintiff. (JAG) Additional attachment(s) added on 5/3/2006 (LSC,). (Entered: 12/28/2005)
07/17/2003	42-1	Plf 1 appeal to 9CCA of (32-1) filed 05/30/2003. cc: cnsl, Judge, 9CCA w/CADS & Representation Statement
07/17/2003	42	NOTICE OF APPEAL as to 32 Judgment by Joseph Frederick. (JAG) (Entered: 12/28/2005)
03/31/2006	55	ORDER of USCA as to [42] Notice of Appeal filed by Joseph Frederick. Costs shall be taxed against Appellees. (LSC) (Entered: 04/04/2006)
05/03/2006	56	USCA JUDGMENT as to [42] Notice of Appeal filed by Joseph Frederick. the judgment of said District Court in this cause be, and hereby is vacated and remanded. (Attachments: # 1 Opinion)(LSC,) (Entered: 05/03/2006)

II. PLEADINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

[Filed: Apr. 25, 2002]

COMPLAINT

Jurisdiction and Venue

1. The Plaintiff, Joseph Frederick, seeks redress for violations of his federal civil rights under 42 U.S.C. § 1983 and the First Amendment to the United States Constitution, and to his civil rights under state law as set out below. This court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1343 (civil rights jurisdiction); 28 U.S.C. § 2201(a) and § 2202 (declaratory relief); and 28 U.S.C. § 1367 (supplemental jurisdiction over state law claims).

2. This court has personal jurisdiction over all parties.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b). All events set out below occurred within

the District of Alaska and all parties are resident of the District of Alaska.

Factual Allegations

4. The plaintiff, Joseph Frederick, is a resident of Juneau, Alaska, and a senior at Juneau-Douglas High School.

5. At all times relevant to this complaint, the Plaintiff was 18 years old and therefore an adult under Alaska Law.

6. Defendant Deborah Morse is and was at all times relevant to this complaint the principal of Juneau Douglas High School.

7. The Defendant Juneau School Board is a subdivision of the City and Borough of Juneau, a local government, and is the body responsible for policies and governance of the public schools in the Juneau School District.

8. On January 24, 2002, the Olympic Torch Relay was run through the public streets of Juneau, Alaska.

9. The Olympic Torch Relay was an event sponsored by the U.S. Olympic Committee, the Coca-Cola Company, and Chevrolet, and their local affiliates.

10. The route of the Relay on January 24th took it through several parts of Juneau, including along a portion of Glacier Avenue that runs between Juneau Douglas High School and a residential neighborhood.

11. Prior to the arrival of the Relay, teachers at the High School were given the option of releasing their students so they could view the Relay pass. A number of teachers did so.

12. Among the students released by their teachers, most viewed the Relay from the public sidewalk on the High School side of Glacier Avenue. Some left school grounds and went to the other side of the street, the residential side. Other

students left school grounds and went downtown to eat at McDonald's.

13. Prior to the arrival of the Relay on Glacier Avenue, Joseph Frederick arrived in the area in his car and parked along a public street off of Glacier Avenue. He did not enter school grounds before the Relay arrived.

14. As the Relay approached the area, snowball fights broke out among the students and then bottles of Coca-Cola, handed out by one of the Relay sponsors, were thrown. Joseph was not among the students throwing things.

15. As the Relay approached him, Joseph stood on the public sidewalk on the residential neighborhood side of Glacier Avenue.

16. As the Relay reached his position, Joseph and a number of other persons displayed a banner reading, "Bong Hits 4 Jesus". Joseph held one end of the banner. Joseph and the other students holding the banner remained silent while displaying the banner.

17. Defendant Morse saw the banner from her standpoint on the sidewalk near the High School and immediately walked across the street to the location of the banner on the public sidewalk.

18. Defendant Morse then demanded that the persons holding the banner drop it.

19. Joseph responded by asking her about his right of free speech, upon which she seized the staff holding one end of the banner out of Joseph's hands.

20. The other persons holding the banner then dropped it, upon which defendant Morse rolled it up and took it, telling Joseph to report to her in her office.

21. Joseph went to his car to retrieve his books and immediately went to his next class, where he informed the teacher that he was there but had to go to the principal's office.

22. At the principal's office, defendant Morse told Joseph that she was suspending him from school for five days.

23. Joseph respectfully protested the suspension and quoted Thomas Jefferson on civil liberty to her, whereupon she increased the suspension to ten days.

24. Joseph appealed the suspension to the Superintendent of Schools, who held a hearing at which defendant Morse testified:

a) she seized the banner and gave Joseph the suspension because she thought the banner was encouraging illegal drug use;

b) she would not have seized the banner if it had advocated legalizing drug use; and

c) she conceded that the banner was not obscene, was not offensive to minorities, and did not advocate violence;

d) she was unable to state in any way in which the display of the banner disrupted classroom instruction or interfered with the educational process.

25. At the hearing, Joseph testified that the banner was not intended to advocate drug use, but was intended to be a humorous parody and to see whether the school administration would try to suppress free speech outside of school grounds.

26. The Superintendent modified the suspension to eight days but upheld the seizure of the banner and the rest of the suspension.

27. Joseph appealed the suspension to the defendant Juneau School Board, which upheld it without explanation

28. As a result of the seizure of the banner and the disciplinary actions taken against him, Joseph Frederick has suffered a direct deprivation of his constitutional right of free

speech and expression and a direct deprivation of his right to a public education; and has been further damaged by having a permanent disciplinary record imposed on him, by emotional distress, humiliation, loss of enjoyment of life, and mental anguish.

Count I – Violations of Federal Constitutional Rights

29. All previous paragraphs are incorporated herein.

30. The First Amendment to the United States Constitution guarantees to all persons, including to all high school students, freedom of speech and freedom of assembly.

31. By seizing the banner, by punishing Joseph Frederick for displaying the banner, and by punishing him for quoting Thomas Jefferson on civil liberties, the defendants violated his right to free speech under the First Amendment to the United States Constitution and deprived him of his constitutional civil rights in violation of 42 U.S.C. § 1983.

Count II – Violations of State Constitutional Rights

32. All previous paragraphs are incorporated herein.

33. Article I, Section 5, of the Constitution of the State of Alaska guarantees to all persons the right to freely speak, write, and publish on all subjects.

34. Article VII, Section 1, of the Constitution of the State of Alaska guarantees to all school-age persons in Alaska the right to public education.

35. By punishing Joseph Frederick for displaying the banner and for quoting Thomas Jefferson on civil liberties, the defendants violated his right to freely speak under the Constitution of the State of Alaska.

36. By suspending Joseph Frederick from school for displaying the banner for and for quoting Thomas Jefferson

on civil liberties, the defendants violated his right to a public education under the Constitution of the State of Alaska.

Prayer for Relief

Therefore, Plaintiff demands judgment and relief as follows:

A. A declaration that the Defendants have violated the rights of the Plaintiff under the First Amendment to the United States Constitution; Article I, Section 5, of the Constitution of Alaska; and Article VII, Section 1 of the Constitution of Alaska;

B. A mandatory injunction prohibiting Defendants from further violating the same rights of the Plaintiff or similarly situated persons;

C. A mandatory injunction requiring Defendants to remove all reference to discipline based on the above incidents from his student records and to amend his grades to ameliorate any academic disability suffered as a result of the punishments complained of above;

D. An award of compensatory damages against all Defendants;

E. An award of punitive damages against all Defendants;

F. An award of attorney fees and costs of suit pursuant to 42 U.S.C. §1988 and Federal Rule of Civil Procedure 54; and

G. Such other relief as the court may deem proper.

Dated: April 25, 2002

s/ Douglas K. Mertz
Douglas K. Mertz
Attorney for the Plaintiff
Cooperating Attorney, Alaska Civil Liberties Union

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

[Filed: June 20, 2002]

ANSWER OF DEFENDANTS
DEBORAH MORSE AND JUNEAU SCHOOL BOARD

Defendants Deborah Morse and Juneau School Board answer the complaint and allege affirmative defenses as follows:

1. This paragraph purports to characterize plaintiff's claim and otherwise alleges legal conclusions as to which no response is required.

2. This paragraph alleges legal conclusions as to which no response is required.

3. The first sentence of this paragraph alleges a legal conclusion as to which no response is required. Defendants admit the second sentence of this paragraph.

4. Defendants are without knowledge or information sufficient to form a belief as to whether Joseph Frederick is a resident of Juneau, Alaska. Defendants admit that plaintiff was a senior at Juneau-Douglas High School at the time of the events alleged in the complaint and affirmatively allege that plaintiff has graduated and is no longer a student at Juneau-Douglas High School.

5. Admitted.

6. Admitted.

7. Defendants admit that the Juneau School Board is responsible for policies and governance of the public schools in the Juneau School District. The remaining allegations of this paragraph state legal conclusions as to which no response is required.

8. Admitted.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

10. Admitted.

11. Defendants admit that Juneau-Douglas High School teachers were given the option of permitting their students to attend the relay as a class while under the teacher's supervision, and that a number of teachers elected to do so. Except to the extent admitted, the allegations of this paragraph are denied.

12. With respect to the first and second sentences of this paragraph, the defendants deny that students were released by their teachers, admit that many students permitted to observe the relay did so from the sidewalk on the high school side of Glacier Avenue, and that some students also observed from the sidewalk opposite the high school, and deny the remaining allegations of the first two sentences. Defendants are without knowledge or information

sufficient to form a belief as to the truth of the allegations of the third sentence of paragraph 12.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

14. Defendants admit the first sentence of paragraph 14. Defendants deny the second sentence of this paragraph to the extent that it alleges that plaintiff was not in the group of students who were throwing snowballs and bottles. Defendants are without knowledge or information sufficient to form a belief as to whether plaintiff personally threw snowballs or bottles.

15. Admitted, except that, due to snow conditions, defendants do not know whether Joseph was standing on the public sidewalk or in the street.

16. Admitted.

17. Admitted, except that, due to snow conditions, defendants are unable to state whether those holding the banner were on the public sidewalk, in the street, or both.

18. Admitted.

19. Defendants admit that plaintiff questioned defendant Morse's authority over him while standing on a public sidewalk, that she took the banner out of Joseph's hand, and deny the remaining allegations of this paragraph.

20. Defendants admit that the persons holding the banner dropped it and that defendant Morse rolled it up, and that she directed plaintiff to return to her office with her. Except to the extent admitted, the allegations of this paragraph are denied.

21. Defendants admit that plaintiff went to his next class, deny that he immediately informed his teacher that he had to go to the principal's office, and are without knowledge or information sufficient to form a belief as to the remaining allegations of this paragraph.

22. Denied.

23. Denied.

24. Defendants admit that plaintiff appealed the suspension to the superintendent of schools and that the defendant Morse participated and spoke at the appeal; defendants admit that plaintiff was suspended for a variety of reasons, as stated in the notice of suspension, including displaying a banner that defendant Morse believed encouraged illegal drug use; defendants admit that Morse stated that she probably would not have seized the banner if it had contained a political statement, including a statement advocating legalizing drug use; defendants admit that defendant Morse conceded that the banner was not obscene, offensive to minorities, and did not advocate violence; defendants deny that defendant Morse stated or implied that display of a banner advocating illegal drug use was not disruptive to classroom instruction or that it would not interfere with the educational process. Except to the extent admitted, the allegations of paragraph 24 are denied.

25. Defendants admit that in the course of the appeal to the superintendent, plaintiff stated that the banner was not intended to advocate drug use, and deny the remainder of the allegations of this paragraph.

26. Admitted.

27. Denied.

28. This paragraph states a conclusion of law, as to which no response is required. To the extent that response is required, defendants deny the allegations of this paragraph except that they admit that plaintiff's suspension is reflected in his disciplinary record.

29. Defendants incorporate by reference their responses to all previous paragraphs.

30. This paragraph states a conclusion of law as to which no response is required.

31. Defendants admit that defendant Morse took the banner from plaintiff, deny that he was punished just for displaying the banner, and deny that he was punished for quoting Thomas Jefferson on civil liberties. The remainder of this paragraph alleges a conclusion of law as to which no response is required. To the extent that further response is required, defendants deny the allegations of paragraph 31.

32. Defendants incorporate their responses to all previous paragraphs.

33. This paragraph states a conclusion of law as to which no response is required.

34. This paragraph states a conclusion of law as to which no response is required.

35. Defendants deny that plaintiff was punished solely for displaying the banner and deny that he was punished for quoting Thomas Jefferson on civil liberties. The remainder of this paragraph states a legal conclusion as to which no response is required.

36. Defendants deny that plaintiff was punished solely for displaying the banner and deny that he was punished for quoting Thomas Jefferson on civil liberties. The remainder of this paragraph states a legal conclusion as to which no response is required.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim on which relief may be granted.

2. Plaintiff has failed to mitigate his damages.

3. The School Board is immune from any award of damages pursuant to the Eleventh Amendment to the Constitution of the United States.

4. Defendant Morse has qualified immunity from any award of damages in that there is no clearly settled rule of

law prohibiting a high school principal from disciplining a student under her care and supervision for displaying messages that a reasonable person would understand to advocate use of illegal drugs.

5. The School Board is immune from any award of punitive damages.

6. All defendants are immune from state law damage claims for their discretionary actions pursuant to AS 9.65.070 (d)(2).

7. All defendants are immune from state law damage claims for their actions in enforcing an approved school disciplinary and safety program pursuant to AS 14.33.140.

PRAYER FOR RELIEF

Wherefore, defendants request that the Court enter judgment as follows:

1. That the complaint be dismissed, with prejudice, and that plaintiff take nothing;

2. That the Court award defendants their attorneys' fees and costs of suit pursuant to 42 U.S.C. § 1988, Federal Rule of Civil Procedure 54, and Alaska Rules of Civil Procedure, Rule 82; and

3. That the Court grant such other and further relief as it may deem appropriate.

Dated this 20 day of June, 2002, at Juneau, Alaska.

Respectfully submitted,
DAVID C. CROSBY, P.C.

s/ David Crosby
David C. Crosby
Alaska Bar No. 7106006
Attorney for Defendants

III. DECLARATIONS AND AFFIDAVITS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DECLARATION OF DEBORAH MORSE

I, DEBORAH MORSE, under penalty of perjury do swear and affirm that the following statement is true and correct to the best of my knowledge.

1. I am one of the named defendants in this proceeding. Since July 2000, I have been the principal of Juneau-Douglas High School ("JDHS") in the Juneau School District ("District"). I make this declaration in support of defendants' Motion for Partial Summary Judgment.

DISTRICT POLICY RE DISPLAY OF MESSAGES
ADVERTISING OR ADVOCATING
USE OF ILLEGAL DRUGS

2. Use of drugs and alcohol by students is a serious problem in all secondary schools, including JDHS. The Juneau School Board has mandated programs for drug and alcohol education (Board policy 1422), as well as

comprehensive intervention with and discipline of students involved with illegal substances (Board policy 5530).

3. Consistent with the educational mission of the school district, the Juneau School Board by policy prohibits dissemination of messages that might encourage students to use drugs or alcohol. Specifically:

- Board policy 5511 provides that "[C]lothing that ... advertises or advocates the use of illegal drugs, alcohol or tobacco is prohibited as inconsistent with the District's educational mission and disruptive to the District's educational program."
- Board policy 5520 "prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors."
- Board policy 5721 prohibits distribution or display of materials that "advocate the use by minors of any illegal substance or material."
- The District's responsibilities as in loco parentis also require that messages advocating, or promoting use of illegal substances be removed, to the extent possible, from the learning environment, including the environment at school-sanctioned activities.

4. Although Board policies 5511, 5520 and 5721 apply to school premises, Board policy 5850 provides that "[P]upils who participate in approved social events and class trips are subject to District rules for student conduct; infractions of these rules will be subject to discipline in the same manner as infractions of rules during the regular school program."

5. Board policy 5600 gives me "the authority to take such means as may be reasonably necessary to control the disorderly conduct of students in all situations and in all places where such students are within the jurisdiction of the

school district" -- including at approved social events and field trips. In addition, Board policy regulations 5520R require all students to comply "with reasonable directives ... of authorized school personnel during any period of time when he or she is properly under the authority of school personnel."

6. I have attached copies of all of the Board policies and regulations referenced in this declaration. Attachments 1 – 8. These policies were adopted by the Board pursuant to a public process and are subject to review pursuant to a collaborative process that includes students, parents, teachers, and others responsible for student safety. Board policy 7430.

7. The JDHS Handbook and Disciplinary Plan ("the Handbook") incorporates the Board discipline policy and prescribes the level of penalties. Attachment 9. The Handbook was developed through a collaborative process involving students, parents, teachers and administrators. Section 2.12 prohibits possession or display of offensive material and clothing both during normal school hours and at school sponsored/sanctioned functions or activities outside of such hours.

JDHS PARTICIPATION IN THE OLYMPIC TORCH RELAY

8. At some time prior to January of 2002, the United States Olympic Committee announced plans for a relay of the Olympic Torch through Juneau along a route that would take the Torch bearers down Glacier Avenue in front of JDHS. The relay was to be filmed by TV camera crews.

9. Believing the event to have educational value and significance to the community, the District, and I as chief administrator of JDHS, decided to permit staff and students to participate in the Torch relay as an approved social event

or class trip. I was in charge of preparations for the high school. These preparations included:

a. The high school pep band, under faculty supervision, played as the Torch passed JDHS.

b. The high school cheerleaders, under faculty supervision, were out in uniform to greet the Torch-bearers as they passed JDHS.

c. High School teachers were given the option of observing the passing of the Torch with their classes. Students were not "released" from school, but remained under the supervision of their classroom teachers and school administrators while observing the relay. I am not aware of any teachers that did not permit their students to observe the relay.

d. Four high school students representing various segments of the high school student body were given permission to miss class to act as Torch-bearers.

e. The District also made supervised release time and transportation available for students who were not on the relay route to participate in the event.

THE "BONG HITS FOR JESUS" BANNER INCIDENT

10. At around 9:30 a.m. on January 24, 2002, the high school student body lined both sides of Glacier Avenue in front of the high school. Students were permitted to stand on either side of the street. Many students chose to view the relay from vantage points on campus because the campus is higher than street level and enabled them to see over the heads of students standing on the sidewalk. I was stationed directly in front of the high school supervising crowd control. I was assisted by other administrators, classroom teachers and school staff. I passed back and forth across the street on numerous occasions, as required, in order to maintain proper supervision of the student body.

11. It has always been my understanding that the school district is responsible for the safety and good conduct of students attending school-sponsored events that are supervised by District personnel, regardless of where those events take place, and that this is especially so if the event takes place during the school day. This belief is based in part on Board Policies 5850, 5600, and 5520, which extend District rules and my enforcement authority to approved social events and field trips off campus. I specifically believe that all students observing the Olympic Torch relay in the immediate vicinity of the high school were my responsibility and under my supervision, regardless of whether or not they were physically standing on school grounds.

12. In the course of my duties, I observed high school senior Joseph Frederick standing on the opposite side of the street from JDHS with a group of students and young people. I spoke to members of this group on two occasions. The first was to investigate the throwing of snowballs and beverage bottles that originated from the vicinity of this group.

13. As the camera truck and relay runner passed, members of Frederick's group unfurled a large banner bearing the words "Bong Hits for Jesus." See attachment 10. The banner was in full view and easily readable by students on the high school side of the street, including a large number of students who were viewing the relay from on-campus locations.

14. To my knowledge, a "bong" is a slang term for a water-cooled pipe or pipe-like device commonly used for smoking marijuana. To my knowledge, the term "hit" is slang for inhaling marijuana. I believe that the reference to a "bong hit" would be widely understood by high school students and others as referring to smoking marijuana.

15. I immediately approached the group and asked them to put the banner down. Most of the students immediately dropped the banner. Frederick, however, refused and asked

"What about our First Amendment rights?" I told him that the banner was not appropriate for displaying at a school function. He objected that he was not on campus and that I therefore had no jurisdiction over him.* I responded that he was participating in a school activity, and that I did have such authority. I confiscated the banner and requested that Frederick come with me to my office. Instead, he turned and walked in the opposite direction. When he didn't come to my office, I looked up his class schedule, went to his class and accompanied him to my office.

16. I told Frederick and the other members of his group to put the banner down because I felt that it violated the policy against displaying offensive material, including material that advertises or promotes use of illegal drugs. I also believed that display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use and inconsistent with the District's basic educational mission to promote a healthy, drug free lifestyle. I felt that failure to react to the display of such a banner at a school-sanctioned event would appear to give the District's imprimatur to that message and would be inconsistent with the District's responsibility to teach students the boundaries of socially-appropriate behavior.

17. During the interview in my office, I told Frederick that I had asked him to drop the banner because I thought the reference to "bong hits" would be construed as advocating drug use. He denied that his sign had this meaning, or any

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* I later learned that Frederick had not reported to his homeroom class prior to attending the relay because his car was allegedly stuck in s snow bank. I did not know this at the time, but it would not have made any difference to my decision to confiscate the banner.

meaning at all, and went so far as to invent an acronym for "bong hits," which he wrote out on a piece of paper. Attachment 11.

18. I issued a ten day suspension to Frederick for multiple infractions, including violation of the policy requiring obedience to reasonable staff directives and the policy against displaying offensive materials. Attachment 12.

DATED this *26* day of November, 2002, at Juneau, Alaska.

s/ Deborah Morse
Deborah Morse

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

AFFIDAVIT OF JOSEPH BAKER FREDERICK

I, Joseph Baker Frederick, first duly sworn, do hereby testify as follows:

1. I am the plaintiff in this lawsuit.

2. In January of 2002, I was eighteen years old and living in Juneau, Alaska. I had already met all my high school graduation requirements and was taking a few courses to finish up my senior year at Juneau Douglas High School.

3. Sometime in that month, a few friends and I heard that the Olympic Torch Relay would be running through Juneau. It was an event, sponsored by Coca-Cola and other businesses, to promote the Winter Olympics in Salt Lake City, in which the Olympic torch would be handed off from runner to runner as they went through Juneau, from which the flame would then be taken to another city, and eventually to Salt Lake City.

3. My friend and I got the idea that we would show a humorous banner when the runners passed by. We figured we would show the banner at some location where there were TV cameras taping the runners. We decided that the banner should say, "Bong Hits 4 Jesus." I am not sure where we got

this phrase, but I know it is used on a popular brand of snowboard. Our intention was to do a humorous parody. Since that time I have seen the website of a group called "Bong Hits for Jesus" which does the same sort of thing at the New Orleans Mardi Gras every year, namely parodying and making fun of fundamentalist religious groups who protest against the Mardi Gras revelry. That fits right in with what we were trying to do. We were not trying to deliver a religious message or any message related to drug use. I know the School District now claims we were trying to make some sort of statement about drug use, but that it not true at all. It was a parody, an attempt to be funny. We were not advocating anything. We thought we had a free speech right to display a humorous saying, and that's all we were doing. The content of the banner was less important to us than the fact that we were exercising our free speech rights to do a funny parody.

4. The Torch relay was scheduled for January 24, 2002. So just before that day, some friends and I made the banner, and on the 24th we took it to a place where we knew the relay would take place and where there were going to be TV cameras. We chose a place on Glacier Avenue, on the published route of the relay, that was across from the public swimming pool. The pool is adjacent to the high school. So we were on the opposite side of the street from the high school. We purposely avoided the high school grounds itself. We wanted to be on a public sidewalk but not on school grounds so there would be no reason for the school to bother us and so it would be clear that we had free speech rights.

5. That morning, my car got stuck in the driveway so I missed my first class of the day. By the time we got the car out and drove into town, there were already people standing along the relay route, waiting for the runners. I parked several blocks away from the high school, on a public street. From there, a friend and I went directly to the spot at which we were going to display the banner. We never went onto

school grounds until after the banner was displayed and seized from us.

6. As we waited for the relay to come by, there were a lot of people, including both students and non-students, on both sides of the street. We could see some students leaving the campus and heading downtown. Some of the students who stayed waiting for the runners got a little unruly, and several snowball fights broke out. Some of the students on the high school grounds threw snowballs at a police car driving by. There were several fights. I did not participate in the snowball throwing or the fights, nor did anyone else waiting with the banner with me.

7. The first part of the relay was a Coca-Cola truck which handed out small banners advertising Coca-Cola and (in smaller print) the Torch Relay. People on the truck were handing out plastic bottles of Coke. After that truck went by, several students started throwing the Coke bottles at each other. We could see some school officials trying to stop them, without much luck. My group of friends and I just quietly waited and did not throw anything or in any way act unruly.

8. When the first runner came toward us, and the TV camera (mounted on a truck just in front of the runner) was in front of us, we unfurled the banner so it would be visible to the camera. Almost immediately, the high school principal, Ms. Morse, came toward us across the street, shaking her head. At this point at least two of us were holding the banner and several other people were standing with us. Some of us were students but I know at least one, perhaps more, of those with us were not students and were adults. Ms. Morse came up to me and demanded that we put the banner down. I asked her, what about my free speech rights? We're not on school grounds. (I do not recall the exact words, but it was approximately that; I said it quietly and respectfully.) She told me to take it down, and when I said, "What happened to the Bill of Rights. This is our right to do this. It's a free

speech exercise," she said, "Not here it's not," and she grabbed the banner out of my hands, and then the others holding the banner dropped it. She crumpled up the banner and ordered me to come to her office.

9. I then got my books from my car and went into the high school, stopping first at my physics class to let the teacher know I was there but had to go to the principal's office. At that point, I met an assistant principal and went with him to the principal's office.

10. At her office, the principal told me that I was suspended from school for five days for disruptive behavior. I asked what was disruptive, and they said I was defiant as well, because I was questioning why they were suspending me. I asked again about my First Amendment rights, and I quoted Jefferson (I think he was paraphrasing Voltaire), that "Free speech cannot be limited without being lost." Her response was to tell me to stop arguing because that just got me an additional five days suspension. They also charged me with truancy because I missed the first class that morning, even though I had an excuse and almost no one is ever charged with truancy, even if they intentionally skip classes.

11. At all times I was calm and respectful with her. The only "arguing" I did was what I just described, namely raising again the question of whether I had a First Amendment right to display the banner and quoting Jefferson. I know that of all of us who were disciplined for holding the banner, I was the only one who quoted Jefferson to her and that I was the only one who got the additional five days suspension.

12. In the same meeting in the principal's office assistant prinicipal [sic] Dale Staley told me that the Bill of Rights doesn't apply to students. When I asked him, "What about the Bill of Rights? Doesn't that still exist?," he said "not until you graduate," and "not in schools." Ms. Morse was present when he said it.

12. We had a hearing with the Superintendent of Schools at which, Ms. Morse testified that she didn't remember whether I made the quotation from Jefferson. But I definitely did, and that was what caused her to immediately give me an extra five days' suspension.

13. After I served the suspension and returned to classes, a few students mentioned the banner incident, but no one made a big deal of it. There was no disruption of any classes because of it, and to my knowledge it wasn't even discussed in classes. No student or faculty members ever told me they saw the banner as advocating drug use or as saying anything about religion. I can say from my own experience that the high school administration allows t-shirts with alcohol or drug message (such as "You Go to High School, I Go to School High") and advertising of plays with a drug theme. We used to see these things regularly. Our banner was singled out, I believe, not because it actually caused any disruption or advocated drug use (it didn't do either of those things) but because the principal found it personally embarrassing or offensive to her. I was punished because I advocated my free speech rights, not because I did anything harmful to the school.

14. I graduated with my class in May of 2002. I am now a student at Stephen F. Austin State University, in Nacadoches, Texas.

Further affiant sayeth naught.

s/ Joseph Frederick

SUBSCRIBED AND SWORN before me this *30th* day of *December, 2002*.

s/ [illegible]
Notary Public for the State of Alaska
My commission expires 9/30/05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

AFFIDAVIT OF MELINDA MADSEN

I, Melinda Madsen, first duly sworn, do hereby testify as follows:

1. I was a sophomore in JDHS last year when the Olympic Torch Relay was run through Juneau.

2. On the day of the torch relay, my teacher released us to go see the relay, but we did not have to stay together or stay with the teacher. The area outside the school was crowded and chaotic. There were kids in the street running back and forth, and there were snowball fights. After plastic Coke bottles were handed out, a lot of the bottles were thrown back and forth. I saw some of my classmates go to their cars. It was easy to slip away. I noticed a few other students did not come back to class after the relay was over, and the teacher noticed their absence but they didn't get into trouble.

3. When the relay came by, I had left the school grounds and was standing near Joe Frederick on the sidewalk on the other side of the street. I saw the banner unfurled and I stood with it. I saw the Principal come over and take the

banner down. Those of us with the banner were not fighting or throwing anything.

4. After the relay there was some discussion of the banner incident in class. But there was no disruption of classes and not even enough discussion to keep anyone from doing classroom work.

5. I didn't think the message on the banner promoted illegal drug use. I'm not sure what it meant, but I didn't think it was suggesting drug use.

Further affiant sayeth naught.

s/ Melinda Madsen

SUBSCRIBED AND SWORN before me this *31st* day of *December, 2002*.

s/ [illegible]
Notary Public for the State of Alaska
My commission expires 9/30/05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

AFFIDAVIT OF MAKANA FIELD

I, Makana Field, first duly sworn, do hereby testify as follows:

1. I was a sophomore at Juneau Douglas High School when the Olympic Torch Relay was run in Juneau in January, 2002.

2. My friend Joe Frederick and I got the idea of displaying a banner when the runners came by. I'm not sure where we got the phrase, "Bong Hits 4 Jesus," but I know we thought it was funny, so that's why we used it. It didn't have any particular meaning. It definitely wasn't meant to say anything encouraging drug use or to say anything about religion. I don't know any students who took it to have a drug meaning, though there was one student who thought we were making a comment about religion.

3. On the day of the relay, Joe and I came in late due to getting stuck in the snow. We arrived in town and parked near the cemetery and walked to a place across from the high school. We never did go on school grounds before the relay passed. I carried the banner to the place where we waited.

There was a group of us, including one non-student, Eli Geil, with the banner.

4. When the runner came by, we unfurled the banner. Ms. Morse, the principal, ran across the street and said something to Joe which I didn't hear, and she grabbed the banner and crumpled it up. I heard Joe protest something about not being on school grounds and this being the United States. At that point I left.

5. Later on I went to school. There was some discussion among the students of the banner, but not much. No one discussed the Olympic relay or the Olympics, including teachers, so I could not see any way in which the event would be considered an educational or school-related event. There were no assignments related to the Olympics that I ever heard of, and no discussions of it.

Further affiant sayeth naught.

s/ Makana Field

SUBSCRIBED AND SWORN before me this *13th* day of *January, 2003*.

s/ [illegible]
Notary Public for the State of Alaska
My commission expires 9/30/05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

AFFIDAVIT OF MICAELA F. CROTEAU

I, Micaela Fowler Croteau, first duly sworn, do hereby testify as follows:

1. In January, 2002, I was a sophomore at Juneau Douglas High School.

2. On the day on which the Olympic Torch Relay was to be run through Juneau, the school allowed students to go out to the street to watch it. It was not a fieldtrip, as no fieldtrip form had to be filled, and parental consent was not required. We were not required to stay together as a class, and I think only the gym class stayed together. We were just told to come back to our next class at a particular time.

3. I went across Glacier Avenue to the non-school side and stood with Joe Frederick and his friends. I was with them when they unfurled the banner as the runner approached. I know that at least one of the people holding the banner was Eli Geil, who was not a student.

4. Just as the banner was unfurled, there was a lot of noise from students fighting, I believe one student (not one of the group with the banner) had hit another over the head with a water bottle. There were also snowball fights going on. The

group with the banner was not fighting or throwing things, just standing there with the banner.

5. After we had all gone back into school following the event, we went right to our classwork. I'm not aware of any discussion that any class held about the relay itself or the Olympics. There was quite a bit of talk among the students about what the school administration did to Joe Frederick. But there was no disruption that I was aware of, of any school classes because of the banner.

6. I am not sure what Joe meant by the saying on the banner. I just took it to be an attempt by Joe to be outrageous or funny, but no one took it seriously as saying anything about drugs or about religion.

Further affiant sayeth naught.

s/ Micaela F. Croteau

SUBSCRIBED AND SWORN before me this *19th* day of *January, 2003*.

s/ [illegible]
Notary Public for the State of Alaska
My commission expires 9/30/05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

AFFIDAVIT OF SARA CROTEAU

I, Sara Croteau, first duly sworn, do hereby testify as follows:

I was a student at Juneau Douglas High School. In January of 2002, when the torch relay was being run near our school, the teacher announced that we could go watch it. Some students did, others did not, and the teacher made no effort to keep those of us who did go out together.

We stood in the snow for a long time waiting for the torch to come by. Many people got bored and left. The school administrators weren't stopping any of the people who left. Many others entertained themselves by throwing snowballs at cars, kids, and teachers. After the Coke truck came by, people were throwing Coke bottles at each other. It was chaos. I could have done whatever I wanted.

Afterwards, a lot of students talked about what had happened with Joe and the banner. None of us really knew what he meant by the banner. I don't think the banner disrupted classes or caused problems in the school in any way.

Further affiant sayeth naught.

s/ Sara Croteau

SUBSCRIBED AND SWORN before me this *20th* day of *January, 2003*.

s/ [illegible]
Notary Public for the State of Alaska
My commission expires 9/30/05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

SUPPLEMENTAL DECLARATION OF DEBORAH MORSE

DEBORAH MORSE declares under penalty of perjury as follows:

1. I am the Principal of Juneau-Douglas High School and a named defendant in this litigation. I make this declaration of my own personal knowledge in support of Defendants' Motion for Partial Summary Judgment re Immunity.

2. I have carefully reviewed Joseph Frederick's affidavit of December 30, 2002. I disagree with a number of the statements made therein, some of which are flatly false.

3. With respect to the statement in paragraph 3 that Frederick was attempting a "funny parody," Frederick repeatedly refused to tell me what was meant by the phrase "Bong Hits 4 Jesus." He said he had seen the phrase on a snowboard or snowboarder apparel. At no time did he state that it was intended to be either "funny" or a "parody," either of which, of course, would have meant that the phrase had some meaning, at least to him. This he denied.

4. With respect to paragraph 4, Frederick states that he was standing "across from the public swimming pool" at the time that he displayed the banner. This is false. The position in which he was standing is clearly identifiable from the houses in the background. It is directly across from the high school.

5. In paragraph 6, Frederick states that he and his friends did not participate in throwing snowballs or fighting. While I am unable to identify any specific student that was throwing snowballs or pop bottles, I can state that it was coming from the vicinity of Frederick and those who later assisted him in holding the banner. One of my concerns was that Frederick's banner would contribute to what was already becoming an unruly situation.

6. In paragraph 8, Frederick quotes me as saying "Not here it's not" in response to his assertion that what he was doing constituted an exercise of free speech. I told him that the message was inappropriate for a school function and asked him to put it down. I did not engage him in the niceties of first amendment law.

7. In paragraph 10, Frederick states that I doubled the time of his suspension because he quoted Thomas Jefferson saying "Free speech cannot be limited without being lost." I do not recall Frederick quoting that statement to me although he may have said something to that effect when we were on the sidewalk. I am sure that he did not use the quote when we were in my office. It is simply false that I doubled the time of his suspension for quoting Thomas Jefferson, or for any other reason. I did not ever tell Frederick that he was going to be suspended for five days and then later increase that time to ten days. After questioning Frederick and consulting the student handbook and Frederick's prior disciplinary record, I determined that an appropriate length of suspension would be ten days. At no time did I ever suggest to Frederick that it would be less. The length of Frederick's suspension was based upon the fact that there were multiple infractions of the

student handbook and his defiant attitude, including his failure to obey my direction to return with me to my office.

8. In paragraph 9, Frederick states that he was on his way to the office when he was met by an assistant principal. This is false. An assistant principal (Katherine Milliron) had to go into the classroom and escort him out to the hallway.

9. In paragraph 11, Frederick states that another student or students holding the banner received only five day suspensions. It is true that one other student (Ryan Elliott) who participated in the banner incident was given five days suspension by Assistant Principal Dale Staley. Elliott was not truant at the time. Mr. Staley was dealing with Elliott at the same time that I was questioning Frederick. We did not confer prior to reaching our independent judgments concerning the appropriate length of suspension with respect to the two students. A student guilty of a Category I infraction may be assigned one to ten days of out-of-school suspension, in the discretion of the administrator handling the matter. A great deal depends on the attitude of the student. My judgment was that Frederick's conduct merited a ten day suspension, based on the number of Category II infractions. Mr. Staley reached his own independent judgment with respect to Elliott.

10. In paragraph 12, Frederick states that Assistant Principal Dale Staley said to him, in my presence, that the Bill of Rights does not exist in school and does not apply until after graduation. Mr. Staley came into my office briefly while I was dealing with Frederick. I recall a brief exchange in which Mr. Staley made some remark to the effect that students do not have the same first amendment rights as adults. Mr. Staley never said anything as foolish as the remarks attributed to him by Frederick, nor have I ever heard him express such views, which we both believe to be incorrect.

11. In paragraph 13, Frederick states that the banner incident did not cause any disruption in the high school. This is not true. It was part and parcel of the disruptive behavior that was coming from students around Frederick (if not Frederick himself), including fights, and throwing snowballs (including at least one directed at me) and pop bottles at passing cars. It also sparked a spate of pro-drug graffiti in the high school. In the period following the incident, I personally observed the following graffiti posted in the halls and grounds of the school: (1) artwork depicting a bong with "4 Jesus" beneath it; (2) the phrase "Doobies [slang for a marijuana cigarette] for Debbie, [i.e., myself]" and (3) a Ninja turtle smoking a joint. It is not true, as stated in that paragraph, that the high school administration allows students to wear t-shirts with alcohol or drug messages. Such apparel is prohibited by board policy and the student handbook. While I cannot say that every infraction is brought to my attention, when it is brought to my attention the student is required to either remove the article of clothing (if possible), turn it inside out, told never to wear the article of clothing again at school, or if the infractions are numerous, a call is made home to the parents. Adolescents being adolescents, there is always a fair amount of pushing the line to see how teachers and administrators will react (witness Frederick's behavior on the occasion in question). I am not aware, as referenced in that paragraph, of any school plays with "drug themes," in the sense that a reasonable person would take the subject matter as advocating use of illegal substances. Use of illegal substances, unfortunately, is a fact of life, and may have been dramatically depicted in one or more student productions. The school would never permit or sanction, however, any production that treated the subject jokingly, advocated illegal drug use or glorified use of illegal substances.

DATED this *22nd* day of January, 2003, at Juneau, Alaska.

s/ Deborah Morse
Deborah Morse

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DECLARATION OF DALE STALEY

DALE STALEY declares under penalty of perjury as follows:

1. I am the Assistant Principal of Juneau-Douglas High School. I make this declaration of my own personal knowledge in support of Defendants' Motion for Partial Summary Judgment re Immunity.

2. I have carefully reviewed paragraph 12 of Joseph Frederick's affidavit of December 30, 2002. In that paragraph Frederick states:

> In the same meeting in the principal's office [i.e., meeting in which Principal Deborah Morse suspended Frederick], Assistant Principal Dale Staley told me that the Bill of Rights doesn't apply to students. When I asked him "What about the Bill of Rights? Doesn't that still exist?," he said "Not until you graduate," and "not in schools." Ms. Morse was present when he said it.

3. I took no part in determining whether Frederick had violated any provisions of the student handbook. I was not

asked to, nor did I, participate in determining the discipline accorded to Frederick.

4. I was in Ms. Morse's office briefly when Frederick was present. I recall making a brief comment in response to something Frederick said to the effect that high school students do not have the same first amendment rights as adults. I did not at any time tell Frederick that the Bill of Rights does not exist in school or that it does not apply to students until after they graduate. Nor would I have made those statements, because I know them to be untrue. Part of my training as a school administrator included basic instruction in the rights of students. I know that students do have the first amendment rights, although those rights are not as extensive as might be accorded an adult in a non-school setting. Students have the first amendment right, for example, to express their views on political matters in a non-disruptive manner. School district policies, however, do not permit students to display materials advocating or glorifying use of drugs or alcohol.

5. At the same time that Ms. Morse was busy with Frederick, I was questioning another student involved in the banner incident, Ryan Elliott. Under the circumstances, I felt five days was an appropriate out-of-school suspension for Elliott's multiple Category II violations. Unlike Frederick, Elliott was not truant at the time of the incident. I arrived at my sense of the appropriate consequence without consulting with Principal Morse. I did not advise Principal Morse of my decision prior to her independent decision to suspend Frederick for ten days.

DATED this 22 day of *January*, 2003, at Juneau, Alaska.

s/ Dale Staley

Dale Staley

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DECLARATION OF GEORGE GRESS

1. George Gress declares, under penalty of perjury, as follows:

2. I am a teacher at Juneau Douglas High School. On January 24, 2002, during the time when the Olympic Torch Relay was passing by the Juneau Douglas High School, Sara Croteau was an enrolled student in my class.

3. Pursuant to the instructions of the Principal's office, I elected to let my students go out to observe the passing of the Olympic Torch as a school sponsored and supervised event.

4. The entire class went out to view the relay. Individual students were not given the option of remaining in class, nor were they released to do as they pleased. They were to watch the relay with the rest of the student body and return directly to their classrooms.

5. I did not insist that my students remain together as a group, as long as they remained with the student body viewing the relay. I did, however, assist in providing crowd control with the student body in general.

6. For the most part the student body was very well behaved while awaiting the arrival and observing the passage of the Torch. There were numerous administrators, teachers (including myself) and staff interspersed with the students. The student body was at all times under the supervision and control of the administrators, teachers and staff.

DATED this *6th* day of February, 2003, at Juneau, Alaska.

s/ George Gress

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DECLARATION OF GRETCHEN KRIEGMONT

1. Gretchen Kriegmont declares, under penalty of perjury, as follows:

2. I am a teacher at Juneau Douglas High School. On January 24, 2002, during the time when the Olympic Torch Relay was passing by the Juneau Douglas High School, Melinda Madsen was an enrolled student in my class.

3. Pursuant to the instructions of the Principal's office, I elected to let my students go out to observe the passing of the Olympic Torch as a school sponsored and supervised event.

4. The entire class went out to view the relay. Individual students were not given the option of remaining in class, nor were they released to do as they pleased. They were to watch the relay with the rest of the student body and return directly to their classrooms.

5. I did not insist that my students remain together as a group, as long as they remained with the student body viewing the relay. I did, however, assist in providing crowd control with the student body in general.

6. For the most part the student body was very well behaved while awaiting the arrival and observing the passage of the Torch. There were numerous administrators, teachers (including myself) and staff interspersed with the students. The student body was at all times under the supervision and control of the administrators, teachers and staff.

DATED this *6th* day of February, 2003, at Juneau, Alaska.

s/ Gretchen O. Kriegmont

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DECLARATION OF JANNA LELCHUK

1. Janna Lelchuk declares, under penalty of perjury, as follows:

2. I am a teacher at Juneau Douglas High School. On January 24, 2002, during the time when the Olympic Torch Relay was passing by the Juneau Douglas High School, Makana Field was an enrolled student in my class.

3. Pursuant to the instructions of the Principal's office, I elected to let my students go out to observe the passing of the Olympic Torch as a school sponsored and supervised event.

4. The entire class went out to view the relay. Individual students were not given the option of remaining in class, nor were they released to do as they pleased. They were to watch the relay with the rest of the student body and return directly to their classrooms.

5. I did not insist that my students remain together as a group, as long as they remained with the student body viewing the relay. I did, however, assist in providing crowd control with the student body in general.

6. For the most part the student body was very well behaved while awaiting the arrival and observing the passage of the T[illegible]. There were numerous administrators, teachers (including myself) and staff interspersed with the students. The student body was at all times under the supervision and control of the administrators, teachers and staff.

DATED this *6th* day of February, 2003, at Juneau, Alaska.

s/ Janna Lelchuk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DECLARATION OF LYNN MEYERS

1. Lynn Meyers declares, under penalty of perjury, as follows:

2. I am a teacher at Juneau Douglas High School. On January 24, 2002, during the time when the Olympic Torch Relay was passing by the Juneau Douglas High School, Micaela Fowler Croteau was an enrolled student in my class.

3. Pursuant to the instructions of the Principal's office, I elected to let my students go out to observe the passing of the Olympic Torch as a school sponsored and supervised event.

4. The entire class went out to view the relay. Individual students were not given the option of remaining in class, nor were they released to do as they pleased. They were to watch the relay with the rest of the student body and return directly to their classrooms.

5. I did not insist that my students remain together as a group, as long as they remained with the student body viewing the relay. I did, however, assist in providing crowd control with the student body in general.

6. For the most part the student body was very well behaved while awaiting the arrival and observing the passage of the Torch. There were numerous administrators, teachers (including myself) and staff interspersed with the students. The student body was at all times under the supervision and control of the administrators, teachers and staff.

DATED this *7th* day of February, 2003, at Juneau, Alaska.

s/ Lynn M. Meyers

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

SECOND SUPPLEMENTAL
DECLARATION OF DEBORAH MORSE

DEBORAH MORSE declares under penalty of perjury as follows:

1. I am the Principal of Juneau Douglas High School and a named defendant in this action. I make this second supplemental declaration in opposition Plaintiff's Motion for Summary Judgment and in support of Defendants' Cross-Motion for Summary Judgment.

2. I have carefully reviewed the affidavits of students Makana Field, Micaela F. Croteau, Sara Croteau, and Melinda Madsen.

3. These affidavits are cited by the plaintiff in support of his contention that observing the Olympic Torch Relay was not a school sponsored and supervised event. To varying extents, the affidavits attempt to make the following points, none of which is correct:

a. That observing the Olympic Torch Relay was voluntary and that some students left the area. Attendance at the relay was voluntary on a class-by-class basis. Once the teacher and his or her students

decided to observe the relay, individual students were not given the option of remaining in the classroom or doing something else while the relay passed. They had to go outside and observe the relay with their class. While it is possible (indeed probable) that a very few students disregarded these instructions and left the viewing area, anyone who did so would have been considered truant and in violation of the clear staff directive to observe the relay from either side of Glacier Avenue in front of the high school and then return immediately to their classrooms.

b. That the students who observed the relay were not organized as a student body and were not required to stay with their classes or teachers. Students were not required to stay with their class or their classroom teacher as long as they remained in the viewing area (i.e., either side of Glacier Avenue in front of the high school). Although teachers were not required to remain with their classes, teachers, administrators and other staff were interspersed throughout the body of students at appropriate intervals for maintenance of crowd control.

c. That the school staff was not, in fact, in control of the student body. This is absolutely false. There were more than 1000 students lining Glacier Avenue to observe the passing of the torch. As a group, the student body was extremely well behaved throughout the event. Indeed, the only group that was markedly unruly was the group that included the plaintiff and his friends.

DATED this *7th* day of February, 2003, at Juneau, Alaska

s/ Deborah Morse
Deborah Morse

IV. TRANSCRIPT EXCERPTS

JUNEAU SCHOOL DISTRICT

IN THE MATTER OF:
JOSEPH FREDERICK, STUDENT

TRANSCRIPT OF HEARING*

March 13, 2002

page 59, line 15 to page 60, line 3

[J. FREDERICK:]

* * * * *

So I went to her office. And her and Mr. Staley were there and I asked them what was wrong. And they asked me about the banner. And I was like, "Doesn't the Bill of Rights still exist? Isn't it still in effect?" And they said, "Not in school it's not. You don't have rights here." And then I quoted Thomas Jefferson when he said freedom of speech cannot be limited without being lost. And they blew it off. They didn't seem to care about anything I was saying.

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* The school board hearing transcript excerpts reprinted herein were part of the district court record. The excerpt from pages 59-60 was also part of the court of appeals record.

They asked me to name everybody who was involved in holding the sign. I said I didn't know (begin p. 60) everybody. And then they immediately said I would be suspended for even longer for interfering with an investigation. And then (indiscernible) happened next.

* * * * *

page 123, lines 2-25

MR. MERTZ: By Joe.

MS. MORSE: I didn't see Joe throw anything.

MR. MERTZ: Was Joe acting disrespectfully to you?

MS. MORSE: He was never.

MR. MERTZ: Now, that list of trespasses -- supposed trespasses you referred to there. Which of those did you see yourself?

MS. MORSE: I -- I never did see him trespass.

MR. MERTZ: Not one?

MS. MORSE: Not one.

MR. MERTZ: (indiscernible) You stated -- am I correct -- that the so-called trespass incident turned out to be on the -- the swim pool parking lot. The police weren't called by you and your staff. Is that what you said?

MS. MORSE: They weren't.

MR. MERTZ: I'm going to show you a copy of the police report done by the arresting officer. Would you read this paragraph, and then I'll ask you a question.

MS. BECKER: Do you have a copy of that for us to look at Mr. Mertz?

MR. MERTZ: I'm sorry, I don't have another

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NO. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DEPOSITION OF JOSEPH FREDERICK*

August 21, 2002

page 9, line 2 to page 11, line 2

[A.]

* * * * *

A bong -- one reference which the school keeps referring to -- and many people have taken that to be the meaning -- would be a word -- a slang word for drug paraphernalia.

Q. And what kind of drug paraphernalia is it?

A. I believe something to just smoke out of.

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* Certain portions of the Deposition of Joseph Frederick, reprinted herein, are part of the court of appeals record but not the district court record. These portions are denoted in braces {as shown here} and include pages 13, 33, 81-82, and 108-109 in their entirety, as well as lines 1-12 and 22-25 of page 58.

Q. What kind of smoke?

A. Any kind of smoke, I guess.

Q. Marijuana smoke in particular?

A. It would be possible, I'm sure. It's smoke.

(Exhibits 1-4 duly marked)

BY MR. CROSBY:

Q. Handing you what has been marked Exhibit 1 there, it is something that I pulled off the Internet this morning. It says at the top, "Drug Facts, Office of National Drug Control Policy." It says, "Street Terms, Drugs and the Drug Trade, Drug Type, Marijuana." Do you see that?

A. Which column is it?

Q. Just the title up top. It says, "Drug (begin p. 10) Facts, Office of National Drug Control Policy."

A. Yes, I see that.

Q. All right. On the second page there, there is a definition of "bong." Do you see that?

A. I'm looking it up.

Q. Pardon?

A. Hang on one second. Yes, I see it.

Q. And is that the slang definition that you were referring to?

A. I believe that will fit, yes.

Q. And on the next page, there is a definition of the term "hit." Would you read that?

A. (Examines document) Yes.

Q. Are you familiar with the term "hit" as used in that definition?

A. Somewhat.

Q. You have heard that expression, "Take a hit?"

A. Yes, like a hit -- I have heard people say, "Take a hit off a cigarette," or -- once again, smoke would be considered -- use all the same terminology for any kind of smoking.

Q. Have you heard "hit" used in the sense that it is used in this definition that I have just shown to you?
(begin p. 11)

A. Yes, for drugs, marijuana, cigarettes. Yes, I have heard of it.

page 13, line 2 to page 15, line 4

{Q. But you don't think everybody would understand what a bong is?

A. I don't know.

Q. How about the phrase, "bong hit"? If you were to use that phrase with your classmates at Juneau Douglas High School, do you think they would understand what you were talking about?

A. I would say that when people use -- like, I have heard the term before, and people use it, and there is a general amount of people who can understand the meaning of it, but not everybody would know that. I don't know.

I have heard the term before, somewhat of your definition of it. I'm not too familiar with it, but, like, it just depends on people's preferences and what they do, whether or not they have that definition, or if they are familiar with the definitions.

Q. When you use the phrase, "bong hit" or "bong hits" in the banner that you made, what did you mean by it?

A. What did I mean by it?

Q. Yes.

A. Well, I didn't mean for anything to be} (begin p. 14) taken out of context, first of all. I meant it to be a parody,

just a quick laugh or a figure of speech, just because the Constitution gives you a right to free speech. But it doesn't say that it won't protect it if some people don't like it.

Q. The question is: What did you mean by "bong hits"?

A. By "bong hits"?

Q. Yes.

A. It could be mean --

Q. I'm not asking what it could mean. I'm asking what you meant.

A. I didn't write the banner alone. Like, other people had ideas and inputs.

Q. You were one of the people who wrote the banner, were you not?

A. Yes.

Q. What did you mean by "bong hits"?

MR. MERTZ: If it's the same answer, you can tell him it's the same answer. If you want to elaborate --

A. Same answer.

Q. Did you mean anything when you said "bong hits"?

A. Not necessarily. (begin p. 15)

Q. I understand not necessarily, but did you, in fact, mean anything by the phrase "bong hits," or was it a nonsense phrase?

A. It's pretty much nonsense.

page 15, lines 8-18

Q. You just said that it was a parody. What was the phrase, "Bong hits for Jesus," a parody of?

A. For an absurdity. I don't know.

Q. You were just trying to be absurd?

A. Somewhat, just -- it's absurd to some people, depending on -- everything is relative to people's preferences. I mean, some people might have taken offense. Some people might have been happy that it said "Jesus" in it. Who knows? I don't read minds.

page 16, lines 17-18

Q. And your sign meant nothing?

A. Yeah.

page 18, line 19 to page 19, line 6

Q. All right. Exhibit 5 is the transcript of your testimony before the school board. And if you could a look at page 70 of that?

A. (Examines document)

Q. All right. You were being asked by Ms. Gifford at line 6, "I'm just asking you about the phrase, "bong hits." You responded at line 10, (begin p. 19) "Many people reference it to drugs." You knew that, didn't you?

A. Yeah. Like I said, like some people -- I have heard the term, like, go around before, like -- but, I mean, some people would know it and some people wouldn't.

page 20, lines 15-20

Q. And you knew that at the time you put that banner together, didn't you?

A. That some people may interpret it as -- bong hits as related to drugs?

Q. Yes.

A. I knew that it was a possibility.

page 33, lines 2-25

* * * * *

{A. I know that towards the beginning of the '02 school year, I was not standing for the Pledge of Allegiance, and Ms. Milliron told me that Alaska Statutes require by law that everybody stand when they hear the Pledge of Allegiance.

She told me she would suspend me for ten days, and I had a discussion with her. Then she said she'd hold the days in abeyance. I still had a problem with it, and she said, "Okay, I won't." And there was nothing in abeyance. Later on I found out they were, because they used -- I think they used that as part of suspending me later on.

Q. Is that the incident that is logged here as occurring on October 29, 2001?

A. I believe so.

Q. The one that says, "Suspended for 10 days, with all 10 being held in abeyance. Grounds: 1.14 multiple category II, 1.06 Intimidation/Vendetta/Malicious intent." Is that the one?

A. Well, I recall how this actually came about. There was a discussion about the flag, and I calmly explained my point on it. Then she suspended me.}

* * * * *

page 56, line 1 to page 61, line 24

Q. He would have been around that age, anyway?

A. Yes, because he joined the military last spring.

Q. Now, you say that the idea itself came from you and your girlfriend?

A. The idea is -- the idea to hold up a banner?

Q. Yes.

A. Yes, from me and my girlfriend.

Q. Who came up with the phrase, "Bong hits for Jesus"?

A. It wasn't me. I'd seen it on -- the first place I'd seen it was -- I think I saw it on Tim's snowboard. I'm not sure. I have seen it -- it comes on stickers, like bumper sticker type things. People put them on different things.

I later found out that the term actually came from a Mardi Gras activity between the people out there partying and the evangelistic preachers having a little word battle, debate thing at Mardi Gras every year, I guess. Something -- that's where it originated, I believe, the saying.

Q. At the time that you decided to put this phrase on the banner, where did you get that (begin p. 57) phrase? In other words, did you know about the --

A. I didn't know about the Mardi Gras then. I'd seen it just on the stickers.

Q. Where had you seen the stickers?

A. I saw -- I think I have seen one on a car and on a snowboard. Those are the two places I know I have seen stickers with that on it before.

Q. I understand that you didn't come up with the phrase, but were you the one who decided that was the phrase that would go on the banner?

A. First we had the idea to hold up a banner. We wanted something that -- we just wanted to hold up a banner for the TV cameras, and we wanted it to be somewhat pushy, so we threw in Jesus as a religious thing, to where something that could be controversial or funny or whatever you wanted it to be, or nothing if you don't -- I mean, I don't see it as deep, deep thought or philosophy or anything, you know. It's just anything.

We wanted to hold a banner up for the TV cameras because we heard it was nationally broadcast. I had been disappointed in my civil rights at the school. Like they -- like, for instance, Mr. Staley telling me that the Bill of Rights does not apply in schools, and different (begin p. 58) {instances with the school. They didn't feel that they had to give students rights when they actually do.

And everywhere it seems like people don't realize how important, like, our -- like the First Amendment is. We wanted to just, like, say something like -- that is not -- to me, I couldn't believe that that was confiscated, but -- how should I say this? Like, I figured that if people didn't think we should be allowed to do that, then we weren't in America anymore. It's changing.}

Q. Now, you said you wanted to be pushy. What do you mean by being "pushy"?

A. Well, not pushy, just somewhat to where you are testing something. If we held up a banner that said "Hi," or "Hello," you know, you know, that's not really testing free speech at all.

Q. So you wanted it to be something controversial?

A. Yes.

{Q. And how did you see this phrase as being controversial?

A. Well, it is all in preferences, once again. One way it could be controversial is if you} (begin p. 59) take "bong" as

in the definition that you found on the Internet many times, and put it "for Jesus." Christian people -- I do not believe that they -- I believe they are anti-drugs, so if you put that together, it's somewhat ironic. Some people might just look at it as a joke or whatever. I'm lost on words.

Q. So if somebody perceived this as advocating drugs, then it would be a controversial banner, correct?

A. Yes, if they did, or it could just be like stupid, like not meaning anything.

Q. Were you reaching for some kind of phrase that would be controversial and yet ultimately meaningless?

A. Yes.

Q. And, again, you say you wanted the school to react to this, did you not?

A. Not necessarily. Mainly I wanted it on the TV cameras.

Q. Your intended audience was not your fellow students, was it?

A. No. I mean why play to an audience of only a number when there is cameras right there playing to millions. (begin p. 60)

Q. What did you want the TV audience to perceive as they saw this banner, as the runners passed by Juneau Douglas High School?

A. I just wanted to show that -- to reassure myself that this is America. I have a Bill of Rights. I have the right to do something, whether it's somewhat -- somebody finds it offensive, or somebody doesn't agree with it. I have the right to it.

Q. And what was the message that you were trying to communicate to the national TV audience?

A. That free speech is free speech. As long as you are not threatening someone or harassing someone, you can say what you want.

Q. What was the message that you were trying to convey to the national audience by using the phrase, "Bong hits for Jesus"?

A. The phrase I used doesn't matter. I could have used another phrase and still been going for the same message. It's just to say what you want. I mean, the Constitution doesn't just protect, like, deep speech or legal speech. I mean --

Q. Well, were you trying to communicate an idea to people? (begin p. 61)

A. Just to show that you can do things, like, do what you want because of the Constitution. People don't realize, like, the possibilities, like what the Constitution means anymore. People have forgotten about it.

Q. Well, again, were you trying to communicate -- I realize that your point was that you thought the First Amendment permitted you to do this. But what idea were you trying to communicate with that banner that said, "Bong hits for Jesus?

MR. MERTZ: You have asked it and he's answered it several times. If you have already given your whole answer, say so.

A. Yes. Yes.

Q. Then maybe I don't understand it. You were not trying to convey any particular idea by that language?

A. No. I wasn't trying to spread any idea. I was just trying to assert my right.

Q. Were you trying to prompt a debate about the message, "Bong hits for Jesus"?

A. No, not really. Just to be able to say something.

page 62, lines 4-14

Q. I'm trying to find out who selected it.

A. No, I didn't select that. I mean, I agreed with it when we came up with it in the group. We were just, like, discussing what we could put on there. That seemed, like, light enough that there shouldn't be too big of a deal about it, but enough that we could -- they would let us do it. I mean, like, something that wasn't too easy, that of course they would let us do it, but something that might cause conflict. I'm not sure.

page 67, lines 11-17

Q. So this was just a meaningless string of words together?

A. It could be meaningless. It could be ironic that Jesus' followers don't approve of the "bong hits" definition of that, or it could be just -- what is that, you know? Like, it's all up to personal preferences.

page 68, lines 12-24

Q. Were you trying to state a religious message?

A. No.

Q. Were you trying to state an anti-religious message?

A. I was trying to assert my right to free speech.

Q. I understand that. I'm trying to understand what were you trying to say.

A. We weren't trying to put out a deep message to anybody. We weren't trying to put out a message at all, just show people, that, "Look, you have the right to free speech."

page 70, line 22 to page 71, line 4

Q. And you certainly understood that one way of understanding your banner was that it was a reference to drug use, correct?

A. It is a possibility. (begin p. 71)

Q. And you knew that when you made the banner, correct?

A. I had an idea that some people may see it that way.

page 72, lines 6-17

Q. Do you think that people who thought this controversial saying might be bad might construe it as advocating drugs?

A. It's not advocating drugs, but some people did take it that way. I was surprised that they did. But, like, the school, like Ms. Morse thought that that is what it was, but I didn't expect people to see it as advocating drugs.

Q. You didn't think that that was one possible interpretation of that sign?

A. I don't see how it's advocating anything.

page 73, lines 11-25

Q. Did you think that some people might object to the association of their god's name with a phrase that many people consider refers to drug use?

A. Could be a possibility.

Q. Was it a possibility that you considered at the time?

A. At the time of what?

Q. You just shook your head "yes" --

A. At the time of what?

Q. At the time you created that banner?

A. Sure, it was a possibility.

Q. It was a possibility that you considered at the time, correct?

A. Yes.

page 76, lines 17-25

Q. Was it your intent to attend your first-period class on that date? This would be January 24th.

A. Yes.

Q. And this would have been your auto shop class?

A. Yes.

Q. That starts at 8:00?

A. I believe it did on that day.

page 80, line 2 to page 81, line 25

* * * * *

{A. No. It's like you go up there and turn right or something.

Q. I'm trying to understand where you came back to Glacier Avenue. Was it down by J & J's?

A. Yeah. We walked out over across from Marie Drake, by the doctor's office area. Those streets are next to each other.

Q. Okay. Were there people lined up down there to view the torch parade?

A. Yeah.

Q. And then where did you go?

A. We walked down a little ways, like towards -- like from that area we walked down the street towards, like, the valley direction, like 100 yards or so.

Q. All right. And where did that put you?

A. Across from the pool, maybe.

Q. And did you remain across from the pool, or did you move further down towards the high school?

A. I think it was across from the pool. It was in that vicinity.

Q. And what time would this have been?

A. 9:00 something. I'm not exact. I (begin p. 81) wasn't checking my watch constantly. I didn't have a watch on.

Q. And why did you choose that spot to display your banner?

A. Glacier Avenue was one place I knew that it was coming by, and it was close to the school so I could go to class after I had done it.

Q. Did you consider displaying the banner, for example, down by J & J's?

A. J & J's was further back the opposite direction. We walked over and I think we stopped there because we stopped to talk to somebody we had recognized. I think we saw Eli on the sidewalk, and we stopped to talk to him. And that's just by chance we stopped there.

Q. Did you report in to school prior to watching the torch parade?

A. No.

Q. Did you at any time enter the building prior to the torch parade?

A. No.

Q. And this would have been during the period of time when your first-period class would be meeting?

A. I believe first or second.}

* * * * *

page 108, lines 1 to page 109, line 22

[A.]

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{Then I quoted Thomas Jefferson to them in the office, saying that "Free speech can't be limited without being lost." They told me to stop arguing because I just got another five days right after I quoted Jefferson.

They pretty much went through the handbook seeing -- trying to find things that they could suspend me for that were all vague, display of offensive materials, but who is to say what is offensive? And truancy. They said that they suspend everybody who misses a class, but that is entirely untrue. I mean, they were just going through, using vague rules and things that normally aren't used, just because they were mad or embarrassed, or -- I don't know what their emotion was, but they didn't like it that I tested my free speech. I believe that they did not like me questioning their authority, and they did not want anybody thinking their own way.

Q. Is that pretty much it?

A. I think so. I'll run through it again. She came across the street. I said it was free speech. She said, "Not here." I pointed out that we were off school grounds, too. Because I purposely stayed off school grounds just to make (begin p. 109) sure there wasn't jurisdiction, even though as long as I was not disturbing the educational environment, I should have been allowed to hold it up on school grounds.

But I stayed off specifically to make it even more pure that I wasn't at school because I didn't want to have any

trouble with it. I just wanted it to be complete pure speech. That's why I stayed off school grounds purposely because of that.

And then I went to the office. Yes, their handbook is ridiculous. They can -- anything can be called disruptive. What if you sneeze in class? Then the discussion. I was only to get five days, which is what Ryan got for holding it up. He got five days. That's what she originally told me. Then once I said Jefferson's quote and asked her about the Bill of Rights, they said that I was getting another five days. I thought that was completely unfair.

Q. Anything else you remember?

A. Not at the time.}

page 124, lines 5-11

Q. So you refused to tell her what you meant by "Bong hits for Jesus"?

A. I could care less what it means. I didn't have any meaning, so I couldn't tell her.

Q. I beg your pardon?

A. I could care less what it means, so I couldn't tell her what I meant.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DEPOSITION OF DEBORAH LYNN MORSE*

January 31, 2003

pages 7-9

[A.]

* * * * *

also some other courses through University of Oklahoma and Oklahoma State University.

Q. And education after that?

A. I've taken courses through -- my master's is through University of Alaska Southeast, but I have taken courses in Anchorage at the University of Alaska.

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* Pages 7-9 of the Deposition of Deborah Lynn Morse, reprinted herein, are part of the court of appeals record but not the district court record.

Q. And that's master's in what?

A. Educational leadership.

Q. What does that degree qualify you to do?

A. I'm qualified to be a K-12 principal.

Q. All right. And the courses you took in Anchorage were what?

A. I had taken a job in Dillingham as a special education teacher working with deaf students, and so I was taking sign language courses one summer.

Q. Oh. What other professional training or education have you had?

A. That's basically -- I've taken -- prior -- after my master's program, I have taken ongoing education classes. I was working towards my superintendent's endorsement and so I have had advanced school law classes and general classes in education.

Q. Okay, and where were you taking those courses?

A. Here in Juneau. I was currently in Juneau (begin p. 8) over the last ten years.

Q. Tell me about the advanced school law course. That was here also?

A. Yes.

Q. And who taught that?

A. Dave -- Dave Dagley (ph) I believe was his name. He was a -- he comes up every year, for several years had been working in the education program here and he's actually a professor at the University of Alabama in Birmingham.

Q. Can you just briefly tell us what topics you covered in that?

A. It would've been advanced education, law-related cla- -- topics. He has an emphasis in special education, so there was a lot -- overview of the special education and school law and such.

Q. Well, I'm asking because we all know what that case is about. Did that course or any others you took cover civil rights aspects of school law?

A. Yes.

Q. In what way?

A. We would've gone over the different cases related to students' rights and policy surrounding schools and related to being a principal or a superintendent. (begin p. 9)

Q. Did that include First Amendment issues?

A. Yes, it did.

Q. Can you tell me, to the extent that you recall, what topics you covered within that subject?

A. Of course we would've gone over Tinker, Hazelwood, Bethel, Frasier, all of the pertinent case law related to student rights or school -- anything related to schools.

Q. And when did you take that?

A. It would've been -- the advanced school law was probably taken about nine -- eight, nine years ago. I don't remember exactly.

Q. Well, I don't want to spend too much time on peripheral things, so let's go right to the day of the Olympic torch relay. Tell me what you know or understand about what planning went into the relay by the school district, and I mean -- by the district, I mean anybody in the district.

A. Can you restate that? I'm not sure if I -- exactly what you're saying.

Q. Okay, it's what planning went into district participation in the relay.

A. Okay, the topic first came up at an administrative meeting. The district, every month, we have a meeting with the administrators. At that point

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page 68

[A.]

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holding it up and unrolling it because it was a large banner. So I feel like somebody was -- they were very cooperative of each other on that.

Q. Anything else that led to that conclusion?

A. No.

Q. Other than what you've mentioned, did they-- the people holding the banner, did they do anything else that was disruptive?

A. At the time they were holding the banner, no.

Q. Okay, but later you've mentioned their reaction or Joe's reaction at least to your coming up to them. Anything else that you considered disruptive?

A. Other than coming -- not -- refusing to come with me at my directive and having to -- you know, I asked them to come with me and refusing to do that.

Q. Okay. Anything else?

A. No.

Q. If I could. On Page 3 of that affidavit starting at the sixth line from the top, you state that you are sure that he did

not make a quotation from Jefferson while in the office. And I don't think anybody's saying he said, "Jefferson said," but if we take that to mean a statement about freedom of speech or rights of freedom of speech, there you say you were sure he didn't say it in the office. Now I thought you

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V. MISCELLANEOUS DOCUMENTS

JUNEAU SCHOOL BOARD
POLICIES AND REGULATIONS
1422, 5520R, 5530, 5530R-1,
5530R-2, 5600, 5600R, AND 7430

[Attachments 1-8 to the Declaration of Deborah Morse]

BOARD POLICY NO. 1422

HEALTH EDUCATION

The Superintendent shall develop and implement a coordinated, sequential health education program, which includes instruction in alcohol and drug abuse prevention, dental health, family health, environmental health, social/emotional health, first aid safety, nutrition, and how to access health services. The program will provide students with an opportunity to acquire knowledge that will encourage good health habits for life. Instructional units will be appropriate to the age, maturity, growth, and development of students.

The program will be taught by appropriately certificated district personnel, including counselors, physical education teachers, nurses and classroom teachers. In addition, community resource persons and health organizations may be enlisted to provide enrichment and extensions of the Health curriculum.

A.S. 14.30.360 et seq.
A.S. 14.52.020(a)
A.S. 14.52.100
4 A.A.C. 06.130

Adopted 10/23/84
Revised 5/21/96

BOARD POLICY NO. 5520R

DISRUPTION AND DEMONSTRATION

In accordance with the rights accorded students attending schools in the Juneau City and Borough School District, the district expects all students to act in a manner that will enable themselves to acquire the fullest education possible and avoid behavior that is harmful to the good order of the school, themselves, or fellow students. The following regulations represent the general guidelines for student behavior that guarantee a teacher's right to teach and a student's right to learn.

1. Disruption of School

A student shall not use violence, force, noise, coercion, threat, intimidation, fear, passive resistance or any other conduct disrupt any lawful mission, process, or function of the school. Neither shall a student urge other students to engage in such conduct if a substantial and material disruption or obstruction is reasonably certain to result from his or her urging.

2. Assault on a School Employee

A student shall not intentionally cause or attempt to cause physical injury or intentionally behave in a way that could reasonably cause physical injury to a school employee.

Neither self-defense in the absence of other reasonable options nor action undertaken on the reasonable belief that it was necessary to protect some other person will be considered an intentional act under this rule.

3. Assault of a Student or Other Person Not Employed by the School

A student shall not intentionally cause or attempt to cause physical injury or intentionally behave in a way that could reasonably cause physical injury to any person.

Neither self-defense in the absence of other reasonable options nor action undertaken on the reasonable belief that it was necessary to protect some other person will be considered an intentional act under this rule.

4. Compliance With Directives

A student shall not fail to comply with the reasonable directives of teachers, student teachers, substitute teachers, teacher assistants, principals or other authorized school personnel during any period of time when he or she is properly under the authority of school personnel.

5. Violations of Published Regulations For Individual Schools

When circumstances in an individual school necessitate the issuance of specific rules of conduct in addition to the foregoing, students shall not fail to comply with them.

In resolving disruptions that occur on school premises the following procedures are to be followed:

1. First attempt to remove the disruption by conferring and negotiating with the perpetrators and applying the appropriate district and school rules as required.
2. Failure to resolve the disruption at step one may require the school administration to utilize the support of the local law enforcement agencies. If, in the estimation of the principal, emergency circumstances exist that threaten the health or safety of staff or students then the local law enforcement agency shall be contacted for assistance.

3. All cases of student disruption requiring outside assistance shall be reported to the Superintendent's office.

August 1987

Revised 2/17/98

BOARD POLICY NO. 5530

CHEMICAL USE

The Board of Education recognizes that the misuse of drugs has serious legal, physical, and social implications for the entire school community. The Board is committed to the prevention of drug abuse and the rehabilitation of drug users by educational means, but will take whatever steps may be necessary to protect members of the school community from harm and from exposure to drugs.

For the purpose of this policy, "drugs" include all controlled substances, all chemicals that release toxic vapors, all alcoholic beverages, and any prescription or patent drug, except those medications permitted by Board policy.

The Board prohibits the use, possession, and distribution of any drug or drug paraphernalia on school premises at any time and at any event away from school premises that is sponsored by this Board of Education. Students suspected of being under the influence of drugs will be identified, examined, and reported in accordance with the law, and their parents or guardians shall be contacted as soon as possible.

The Board directs the establishment of a program of drug education in grades kindergarten through 12, including the development and implementation of consistent regulations governing student conduct in relationship to chemical use;

regulations which will be fully explained to students in a deliberate manner at the beginning of each school term; inservice training programs for staff members in order that they may teach students about the consequences of drug use and effectively assist students who manifest problems with drug use; and a counseling program designed to help students resolve problems and make sound decisions.

The Superintendent shall develop regulations for the identification and discipline of students who use, possess, or distribute drugs or drug paraphernalia in violation of law or this policy and for the readmission to school and counseling of students who have been convicted of drug offenses.

A.S. 14.30.360
A.S. 11.71.010 - .040
A.S. 14.30.047

Adopted 1/8/85
Revised 8/12/86
Revised 9/6/88
Revised 6/6/89

BOARD POLICY NO. 5530R-1

CHEMICAL USE: PREVENTION AND INTERVENTION

I. Statement of Philosophy, and Goals

A. Philosophy

The Juneau School District recognizes alcohol and other drug use and dependency are diseases and is firmly committed to assisting all students who have use problems who are willing to cooperate in finding a solution. It is the policy of

the District to identify students with alcohol and other drug use problems and to work with them and their families on a voluntary basis, whenever possible. The District shall continuously develop and maintain K-12 programs in prevention and intervention.

B. Program Goals

1. Abstinence. Student use of alcohol and other mind altering drugs impairs the learning process and is illegal. When students are harmfully involved with alcohol and other drugs they jeopardize their own learning program and seriously impact the learning environment for all other students in order that their development can reach full intellectual, emotional, social and physical potential.

2. Community Partnerships. The District is committed to a comprehensive partnership involving home, school and community to combat pervasive high rates of adolescent use of alcohol and other drugs.

3. Prevention Through Health Education. Students will be required to attend health classes with substance use prevention curriculum.

4. Intervention. Students using substances or involved in negative school-related behaviors which indicate or are consistent with substance abuse, may be assessed and referred for diagnostic evaluation and treatment appropriate to the level of health impairment.

II. Program Design

A. Health and Safety Curriculum Committee. The Health and Safety Curriculum Committee is designated by the Superintendent and the Director of Curriculum and is responsible for the K-12 health and safety curriculum, including chemical health components.

B. District Cluster Team. The District Cluster Team is an interagency networking group which conducts annual reviews of current policies, regulations, procedures, forms and training plan, and recommends revisions for approval and adoption by the Board of Education and the Superintendent.

1. Conducts annual reviews of current policies, regulations, procedures, forms, staff development plan and recommends revisions for approval and adoption by the Board of Education and the Superintendent.

C. Student Assistance Teams. The principal in each building, appoints a Student Assistance Team to implement chemical health programs and supervise the student assistance counselor(s) on a daily basis. The Student Assistance Team is responsible for building-level implementation of approved prevention, intervention and sobriety support programs.

D. Student Assistance Counselors. Student Assistance Counselor may be either a counselor assigned by a state-accredited drug or abuse alcohol treatment agency or a drug/alcohol certified school district employee.

III. Prevention

Each school shall instruct students in issues related to the use of alcohol and other drugs. Programs shall consist of three distinct components: (1) Pharmacology of alcohol and other drug use; (2) The Disease Process of Chemical Dependency and (3) Resiliency Training.

Prevention activities may be increased for students referred by the Student Assistance Team as having risk factors which may contribute to future drug/alcohol dependency problems.

IV. Intervention

A. Identification Procedures

1. Methods of Identification. A behavioral checklist, direct observation of possession or use, positive Rapid Eye Examination, Alco-strip or Breathalyzer are all methods which may be used to identify students suspected of using drugs/alcohol.

2. Behavioral Checklists. Behavioral checklists are District forms designed by the District Cluster team to indicate signs and symptoms of drug/alcohol use or at risk behavior. Behavioral observations will not include diagnostic comments. When requested by the Student Assistance Team, all appropriate school staff will complete behavioral checklists, citing observed behaviors, on students under review by the Student Assistance Team.

3. Procedures for Use of Rapid Eye Examinations. Rapid Eye Examinations have proven to be an effective drug use screening device. They merely indicate the possible

presence of drugs/alcohol and will be administered according to the following procedures:

(a) Only by school district personnel who have been trained in their use.

(b) Only to students who exhibit one or more of the behaviors on the behavioral checklist and whose conduct suggests reasonable basis for suspecting drug/alcohol use in violation of District policy or regulation.

(c) The parents of any student who has been tested will be notified. If a student tests positive on the Rapid Eye Test an observed quantitative urinalysis will be required. The observed quantitative urinalysis shall be performed by a state certified drug/alcohol agency. The cost of the observed quantitative urinalysis shall be paid by the District.

4. Procedures for Use of Alco-strips or Breathalyzer Tests.

(a) Alco-strip or breathalyzer tests shall be administered only by school district personnel who have been trained in their use.

(b) Alco-strip or breathalyzer tests may be administered only to students who exhibit one or more of the behaviors on the behavioral checklist and whose conduct suggests reasonable basis for suspecting drug/alcohol use in violation of District policy or regulations.

5. Refusal to cooperate in a Rapid Eye Examination, Alco-strip or breathalyzer or to obtain and report the results of urinalysis as required by these regulations will result in imposition of discipline as provided in Administrative Regulation 5530R-2 as if the student were under the influence of alcohol or another controlled substance.

B. Referrals.

1. Voluntary Referrals may be made by a parent, the student (self-referral), other students, staff, or community groups or agencies, such as the police, social workers, etc. Any school staff member who learns of a student's behavior which warrants attention will communicate the concern to a member of the Student Assistance Team.

2. Any violation of the student drug and alcohol regulations requires mandatory referral to Student Assistance Team. Serious infractions of the student code, such as assault, possession of a weapon, excessive absenteeism, etc. may be deemed sufficient to require referral to the Student Assistance Team for observation or assessment.

3. Referral and Treatment. Except as expressly provided in these regulations, diagnostic evaluations, testing, professional treatment and professional aftercare, when needed, will remain the responsibility of the student and parent or guardian. The District is committed to cooperation during treatment and aftercare.

The District does not assume responsibility for diagnosing the level of drug or alcohol involvement or the extent of health impairment.

Student Assistance counselor will refer students to a state certified drug/alcohol treatment agency for these services.

C. Student/Parent Conference.

1. If the Student Assistance counselors determine that the student is using alcohol or other drugs, or is at high risk for drug/alcohol use, a member(s) of the Student Assistance Team will meet with the student. The parent or guardian will be contacted to review the Team's findings and provide input for an intervention plan; except when consent for release of information has been denied by a student who has self-referred.

D. Intervention Plan.

1. Development of Plan.

After reviewing all available information about the extent of a student's drug/alcohol involvement, the Student Assistance Team shall develop an Intervention Plan to meet the individual needs of the student. The Intervention Plan may include any of the following elements, in addition to other elements at the discretion of the Student Assistance Team, depending on the level of drug/alcohol involvement:

(a) Prevention education to strengthen pharmacology knowledge, chemical dependency or knowledge, or resiliency training. This program may include family members.

(b) Referral to state certified drug/alcohol treatment agency for diagnostic evaluation and observed quantitative urinalysis.

(c) Referral to drug/alcohol treatment or 12-step program attendance.

(d) Verification of abstinence by treatment status report, observed quantitative urinalysis test, Alco-stick, or Rapid Eye Examinations.

(e) Sobriety Support.

2. Modification of Intervention Plans. Intervention Plans are intended to be dynamic and may be modified by the Student Assistance Team at any time to reflect additional information or to meet the changing needs of the student.

3. Review of Plans with Student and Parents; Consent. Intervention Plans and any changes to existing Intervention Plans shall be reviewed with the student and parent prior to implementation. Intervention Plans require the consent of the parent(s) or legal guardian(s) prior to implementation, with the exception plans developed as a result of a student's violation of Board Policy 5530.

4. Student Assistance records will not be placed in the student's permanent district cumulative file. The district may however, maintain separate, non permanent records as long as the student remains enrolled in the school system.

6-6-89

Revised 11-94
Revised 10-95

BOARD POLICY NO. 5530R-2

CHEMICAL USE DISCIPLINE

USE AND POSSESSION OF CONTROLLED SUBSTANCES

Students are not to use, be under the influence of, or possess any quantity of controlled substances (drugs) or drug paraphernalia, alcoholic beverages or other intoxicants while on school grounds, when going to or coming from school, during school hours (whether on or off campus), or while going to, attending, or coming from extracurricular and school sponsored activities.

Discipline responses advance to the next level for each subsequent violation. Records of violations shall cumulate from one middle school to the other if the student changes the school he or she attends and are cumulative from one grade level to the next from grade 8 through grade 12.

A. FIRST VIOLATION FOR USE OR POSSESSION - LEVEL I

1. Administrative/parent contact.
2. Notification of Police.
3. Suspension up to ten days.
4. Development of Intervention Plan.
5. Administrative/Counselor/Parent Conference to review Intervention Plan during the period of suspension.

B. SECOND VIOLATION FOR USE OR POSSESSION - LEVEL II

1. Administrative/parent contact.
2. Notification of Police.

3. Suspension up to 30 days (requires hearing if over 10 days).

4. Intervention Plan.

5. Administrator/Counselor/Parent conference to review Intervention Plan for school readmittance.

C. THIRD VIOLATION FOR USE OR POSSESSION - LEVEL III

1. Administrative/Parent contact.

2. Notification of Police.

3. Administrative referral to the Superintendent for consideration of expulsion from the Juneau School District by the School Board.

DISTRIBUTION OF CONTROLLED SUBSTANCES

This section shall apply to:

1. Any student who distributes controlled substances, alcoholic beverages or other intoxicants to one or more other students, regardless of amount, at any time while on the school grounds, while going to or coming from school, during school hours (whether on or off campus), or while going to, attending, or coming from school sponsored activities.

A. FIRST VIOLATION - LEVEL I

1. Administrative/parent contact.

2. Notification of Police if the conduct does not already include formal charges.

3. Suspension up to 30 days (requires hearing if over 10 days).

4. Intervention Plan.

5. Administrator/Counselor/Parent conference to review/approve Intervention Plan for readmittance to school.

6. Written warning for Level II referral.

B. SECOND VIOLATION - DISTRIBUTION - LEVEL II

1. Administrative/Parent contact.

2. Notification of police if the conduct does not already include formal charges.

3. Suspension pending a final resolution of criminal charges or the completion of administrative proceedings under this regulation (may require hearing).

4. At the conclusion of administrative or judicial proceedings:

a. Where the proceedings do not result in substantiation of the charges the student may be reinstated to the regular educational program or, where the facts warrant such treatment, the student may be disciplined under the "Use or Possession" sections of this Policy.

b. Upon conviction or entry of a plea of guilty, if the matter is processed through the judicial system, or upon substantiation of the charges by the School Board, the student shall be expelled from the Juneau School District.

Any student expelled under this policy may petition the Board for reinstatement to regular student status under AS 14.30.047 before the end of the expulsion period. Any subsequent violation of this policy by a student so reinstated shall result in sanction under Level III for Use or Possession or Level II for Distribution of Controlled Substances.

There shall be a common set of rules for the entire District. The Superintendent may authorize the imposition of stronger or weaker penalties where unusual circumstances warrant deviation from the penalty schedule described above.

An investigation of an alleged violation of this regulation may be initiated by a report to school personnel from any source. It is not necessary that a District staff member witness an alleged violation.

CLARIFICATION OF TERMS

Extracurricular or School-Sponsored Activities:	All activities sponsored by the District other than those that are offered for credit toward graduation or required by law. Dances, field trips, carnivals, extra-curricular clubs and teams, intramural or interscholastic activities of any nature, music festivals, forensics, Baccalaureate and Commencement are examples of these activities.
Distribution:	"Distribution" means the act of transferring possession from one student to another student, regardless of whether a sale has occurred.
Drug Paraphernalia:	Any object designed, marketed for use in, or modified in such a way as to make it usable for, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance including any object described in CBJ Code 36.45.010.

Controlled Substance:	Any substance whose manufacture, distribution or possession is restricted by the provisions of AAS 11.71.

8-12-86

Revised 3-88
Revised 6-89
Revised 10-95

BOARD POLICY NO. 5600

STUDENT DISCIPLINE

The Board of Education directs the schools to help students become useful, productive citizens, responsible for their own actions.

Teachers and other employees of the Board of Education having responsibility for students shall have the authority to take such means as may be reasonably necessary to control the disorderly conduct of students in all situations and in all places where such students are within the jurisdiction of the School District.

For serious infractions, disciplinary alternatives shall be discussed with the parent(s) or guardian(s). The Board recognizes and respects the rights of parents to participate in decisions about disciplinary procedures to be used with their own children.

4 A.A.C. 07.010
4 A.A.C. 07.030
4 A.A.C. 07.050

Adopted 5/21/85
Revised 6/15/99

BOARD POLICY NO. 5600R

STUDENT DISCIPLINE

1. The principal shall notify all parents of the policy and regulations related to student discipline to be used within the building.

2. When a pattern of inappropriate behavior is apparent, a comprehensive plan to direct and modify student behavior will be developed through cooperative effort by the principal, the student, the parent(s) or guardian(s), and appropriate staff. All parties involved in the development of the plan will be requested to sign the final plan document and shall be provided with a copy of the document.

3. Ethnic and gender data by building of disciplinary actions shall be compiled by the Administration. A list of infractions resulting in discipline and a record of numbers of students who have received discipline more than one time shall be maintained by the Administration. An annual report shall be made to the Board which discusses the effectiveness of Discipline Policy #5600, its Rules & Regulations including appropriate recommendations.

3/26/85

Revised 6/15/99

BOARD POLICY NO. 7430

SCHOOL SAFETY AND SECURITY

The Board of Education is committed to preventing violence and crime on school grounds and to protecting the safety and well being of all members of the school community. The Superintendent or designee shall establish, as appropriate, procedures for maintaining a safe learning and working environment in accordance with all applicable laws and regulations. These procedures shall include procedures for addressing threats to safety posed by individuals and environmental phenomena and procedures for securing District buildings, records and funds.

All the District's policies, regulations and procedures relating to student discipline and safety are components of the District's school disciplinary and safety program. Those policies, regulations and procedures that relate to the following topics must be approved by the Board. They shall be reviewed at least once every three years and revised as needed.

(a) Standards for student behavior and safety. These standards must reflect community standards, incorporate basic requirements for respect and honesty, and must be developed and periodically reviewed pursuant to a collaborative process including students, parents, teachers, and other individuals who are responsible for student safety. Disciplinary standards and procedures for students must be consistent by grade level for all schools in the District.

(b) Standards relating to when a teacher is authorized to remove a student from the classroom for failure to comply with student behavior and safety standards,

defiant behavior, or behavior that endangers the welfare, safety or morals of others.

(c) Procedures for notifying teachers and other members of the school community of dangerous students.

(d) Standards for when teachers and other persons responsible for students are authorized to use reasonable and appropriate force to maintain safety and order.

(e) Policies necessary to comply with applicable state and federal laws, including the Individuals with Disabilities Education Act.

(f) Standards to address the needs of students for whom mental health or substance abuse may be a factor in their non-compliance with school disciplinary or safety standards.

(g) Policies for implementing a student conflict resolution strategy, including non-violent resolution or mediation of conflicts and procedures for reporting and resolving conflicts.

Adopted 6/18/02

JDHS DISCIPLINE PLAN (CATEGORIES I AND II)

[Attachment 9 to the Declaration of Deborah Morse]

2000-01

JDHS DISCIPLINE GRID

CATEGORY I _____JDHS DISCIPLINE PLAN

Definition: Infractions which constitute a significant danger to the health, safety and well being of the school population, or to the personal or public property thereof, committed within or upon school buildings or other property during normal school hours or at school sponsored/sanctioned function or activities outside of such hours.

(See Cat I. Consequences and guidelines for required, additional, and optional steps.)

1.01: Possession or use of a weapon, explosives or other device falling within the definitions and restrictions set forth in B.P. 5540:
-indefinite suspension
-recommended expulsion

1.02: Possession or use of commercial defensive devices (mace, lasers, etc.):

1.03: Abuse of Technology; unlawful or unauthorized access, theft, vandalism, fraud, etc.:
-restitution/relevant community service
-recommended expulsion

1.04: Assault/battery/fighting/attempt to do bodily harm, passive supporters and participants:
-recommend expulsion

1.05: Vandalism, destruction of personal or public property:
-restitution/relevant community service
-recommend expulsion

1.06: Verbal harassment/intimidation/initiation/hazing/ promiscuity/vendetta or malicious intent. Threats to staff or students.
-OSS
-behavior plan/referral to the appropriate outside agencies

1.07: Arson, attempted or committed:
-restitution/relevant community service
-recommend expulsion

1.08: False fire alarm/fire apparatus/bomb threats/911 calls:
-restitution/relevant community service

1.09: Extortion:
-restitution/relevant community service

1.10: Theft:
-restitution/relevant community service

1.11: Solicitation of sale of controlled/illegal substance or paraphernalia:
-refer to Chemical Use Discipline 5530R-2

1.12: Possession or use of controlled/illegal substance or paraphernalia:
-refer to Chemical Use Discipline 5530R-2

1.13: Motor vehicle violation

1.14: Multiple or repeated category II infractions:

1.15: Refusal to identify self or respond to staff request

CATEGORY I CONSEQUENCES AND GUIDELINES

A. All sub-categories (except as noted) require the following in order:

1. An initial conference with the student and phone or written contact with parent or guardian;

2. Police referral/consultation (except 1.15);

3. OSS 1-10 days (except 1.01, weapons which also requires a psychological exam).

B. Additional/optional steps:

4. Expulsion recommendation (other than as required and noted) may be made as a consequence for any infraction which results in serious bodily injury (medical attention required) or gross property damage (felony degree).

5. A behavior plan and/or review of appropriate program placement may be used in addition to, but not in lieu of, other consequences.

6. Failure to comply with assigned consequences will result in increased penalties.

C. Guidelines:

1. A lesser or greater penalty than the minimum or maximum prescribed may not be imposed in any sub category of Cat. I or Cat. II.

2. Administrators and teachers are expected to use sound judgment in ensuring that all consequences fit the degree, nature and other circumstances attending an infraction, including the disciplinary record of the student; and are charged with the duty to maintain consistency, fairness, and objectivity in all disciplinary matters; and to demonstrate the same through appropriate documentation.

3. Administrators will enforce teacher referrals for infractions of approved individual teacher disciplinary plans.

2000-01

JDHS DISCIPLINE GRID

CATEGORY II _____ JDHS DISCIPLINE PLAN

Definition: infractions which constitute violations of school rules, policies, or teacher discipline plans, committed within or upon school buildings or other property during normal school hours or at school and sponsored/sanctioned functions or activities outside such hours.

(See Cat.II. Consequences and guidelines for required, additional and optional steps.)

2.01: Failure to follow safety procedures (shops, labs, etc.)
-confiscation of disruptive/unsafe materials

2.02: Failure to serve teacher-assigned detention:

2.03: Failure to possess or use passes appropriately

2.04: Unauthorized presence (restricted area)

2.05: Unsafe/defiant/disruptive behavior/moshing:

2.06: Trashing/littering/graffiti
-work detail, school/service restitution

2.07: Refusal to identify self or to respond to staff request

2.08: Refusal to cooperate/assist in investigation

2.09: Forgery/misrepresentation (passes, parent notes, etc.)
-restitution/relevant community service

2.10: Alibiing/encouraging infractions

2.11: Misbehavior while substitute present

2.12: Profanity or offensive language, possession or display of offensive material and clothing

2.13: Excessive tardy

2.14: Misuse of technology (non-Cat. I)

2.15: Possession or use of tobacco products/smokeless tobacco:
-citation/tobacco Education Program/smoking -cessation/community service

2.16: Skateboards, hacky sacks or roller blades

2.17: Truancy/skipping class

CATEGORY II CONSEQUENCES AND GUIDELINES

A. All sub-categories require the following in order:

1. An initial conference with the student and phone or written contact with parent or guardian.

2. Detention, 1-8 hours.

3. Conference at school with parent(s), teacher(s), student, and administrator (possible counselor) before re-admission to class.

B. Additional/optional steps:

1. In-school suspension (ISS) of 1-3 days and/or Saturday detention (4 hours = 1 day) may be assigned for multiple infractions (see 1.15 Cat. I) or for aggravated (extreme) infractions in any sub-category.

2. Failure to comply with assigned consequences will be considered a "multiple infraction".

3. A behavior plan/or review of appropriate program placement may be used in addition to, but not in lieu of, other consequences.

C. Guidelines: see Category I Guidelines.

DISCLAIMER

School rules published in this handbook are subject to such changes as may be needed to insure continued compliance with federal, state or local regulations and are subject to such review and alteration as becomes necessary for the routine operation of the school. Not all rules of behavior can be written and inserted in a guide book; however, we expect students to follow reasonable rules and not violate the rights of others.

DISCIPLINE ADMINISTRATORS ARE ASSISTANT PRINCIPALS DALE STALEY AND RON OSIBOV

FREDERICK'S NOTIFICATION OF SUSPENSION

[Attachment 12 to the Declaration of Deborah Morse]

Office of the Principal
10014 Crazy Horse Drive
Juneau, AK 99801 Telephone 463-1900

NOTIFICATION OF SUSPENSION

Parent(s) contacted: *Student is 18 - See ATTACHED NOTE*
Date: *1-24-02*
This is to inform you that *Joseph Frederick* Student # *32395* grade *12th* has been assigned an out-of school suspension on the following date(s): *1/24/02 - 2/6/02 10 day suspension*

The grounds for the suspension: *1.14 Multiple Category II Infractions (2.07, 2.17, 2.05, 2.12) see below*

Parent and student are required to attend a re-entry conference with the Administrator on *Feb. 7, 2002 @ 7:30 A.M.*

N/A Police referral / consultation (except for 1.14)

For suspensions that are more than 10 days you have the right to a formal hearing within 5 days of the suspension that has been scheduled for *N/A*. If both parent and student desire to waive the formal hearing procedure, a letter, clearly stating this intent and signed by both parent and student, shall be submitted to the principal, who is then permitted to render judgement, [sic] based upon information informally presented.

You have the right to appeal this suspension.

Expulsion may be recommended pending further investigation of this incident by the district.

Contact the Principals office at 463-1900 if you have any questions.

TEACHERS: Homework Yes _X_ or No___

Sincerely, s/ Deborah Morse, Administrator

cc: Administrators: Morse, Milliron (11th & 12th), Staley (10th), Scandling (9th & Choice).
Counselors: McCasland, A-J: McConnell, K-S: Hopson, T-Z & Special Education: Coenraad, ESL, Extended Learning, and Foreign Exchange
Drug & Alcohol Counselor: April Hotchkiss.
Attendance: Robidoux
Teachers
Suspension File

Enclosure: Suspension & Expulsion Policy and Procedures
revised: 09/01/01

2.12 - Display of Offensive Material
2.07 - Refusal to respond to staff directive regarding behavior
2.17 - Truancy/Skipping
2.05 - Defiant/Disruptive Behavior /
2.08 Refusal to cooperate/assist in investigation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. J02 008 CV (JVS)

JOSEPH FREDERICK,
PLAINTIFF

v.

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
DEFENDANTS

DEFENDANT'S RESPONSES TO INTERROGATORIES NO. 4 AND NO. 5 OF PLAINTIFF'S FIRST DISCOVERY REQUESTS

[Exhibit F to Plaintiff's Motion for Summary Judgment]

* * * * *

Interrogatory No. 4 and Response

4. Describe all ways in which the display of the banner by the plaintiff and others during the Torch Relay disrupted classroom work at any school of the Juneau School District.

Defendants do not contend that display of the banner disrupted classroom work.

Interrogatory No. 5 and Response

5. Describe all ways in which the display of the banner by the plaintiff and others during the Torch Relay disrupted the non-classroom educational process in any school of the Juneau School District.

Display of a banner that would be construed by many, including students, district personnel, parents, and others witnessing the display of the banner, as advocating or promoting illegal drug use is inconsistent with the district's basic educational mission to promote a healthy, drug free life style. Failure to react to the display of such a banner at a school sanctioned event would appear to give the district's imprimatur to that message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior.

Federal and state law require the district to keep the school environs drug free and to educate students on the dangers of using drugs and alcohol. The district's policies and strategic plan emphasize healthy, drug free lifestyles. The district's approved health curriculum teaches the dangers of using illegal substances. District policies and the JDHS student handbook prohibit the display of offensive materials, including materials that promote or advocate the use of illegal substances. The district's responsibilities as in loco parentis also require that messages advocating, or promoting use of illegal substances be removed, to the extent possible, from the learning environment, including the environment at school-sanctioned activities.

[Responses Verified on September 6, 2002]

JUNEAU EMPIRE ARTICLE - *STUDENTS AND OFFICIALS DISCUSS TEEN DRUG USE*

[Exhibit 1 to Defendants' Motion for
Partial Summary Judgment re Immunity]

JUNEAUEMPIRE.COM

[Logo and Hyperlink Omitted]

Students and officials discuss teen drug use

Tuesday, November 26, 2002

By JULIA O'MALLEY
THE JUNEAU EMPIRE © 2002

Like going to the prom or taking SATs, getting drunk or high is a teenage rite of passage, four Juneau-Douglas High School seniors said in recent interviews.

"I smoke pot to let go, it is a good way to relax," said a bookish, 17-year-old male student, who admitted to habitual use. "It is the only way I enjoy watching television."

The students, a young woman and three young men who spoke on the condition their names not be published, painted a picture of high school life where drinking and smoking marijuana are commonplace, and where harder drugs such as cocaine and ecstasy readily are available.

"I'd say at least 90 percent of the school (students) have at least tried pot," said the girl.

Though the teenagers' claim about the prevalence of drug use may not be true, it also is difficult to refute. No current data definitively describe the extent of the alcohol and drug

problem for young people in Juneau. Depending on which local expert you ask, drug use may be decreasing, remaining the same or soaring to epidemic levels.

Of the four students interviewed, three smoke pot a few times a month, have tried hallucinogenic mushrooms and are curious about trying ecstasy. The student who doesn't smoke pot, an athlete, described weekend drinking that sometimes includes consuming 12 shots of vodka in one evening. He also said his friends used "DXM," or Dextromethorphan, the active ingredient in cough syrup, which is legal and available over the Internet.

All of the students interviewed said they know other students who use cocaine. They also said they had seen a "smorgasbord" of drugs laid out at parties. The young woman described watching her friends get high on coke at such a gathering.

"You would watch people go in the bathroom and they would come out (high)," said the young woman, swirling her index finger at the ceiling.

The four students said that although they don't get high during school hours, they knew people who were stoned in class. Because of the open campus at the high school, it is easy to go somewhere secluded to smoke, the students said.

At least 60 percent of graduating students will be involved in marijuana, according to David Moore, a University of Washington substance abuse expert working in Juneau. Moore is leading the school district's effort to revamp the substance abuse intervention program with the Juneau Effective Prevention Project.

Moore has analyzed and cross-referenced statistics from Juneau's 1999 Youth Behavior Risk survey, the Department of Corrections, the Teen Health Center and the National Council on Alcohol and Drug Dependency. According to Moore, drug and alcohol use in Juneau are above the national average and have increased over the last decade.

"The rate (of marijuana use) among students who drop out is much higher," Moore said. "That is not the normal situation in other communities in the Lower 48. The norm in Juneau is alcohol and marijuana use."

Moore and other JEPP participants have called the situation a crisis, and stressed that many students who use drugs have a problem with chemical dependency and need treatment. Moore's estimates for marijuana use put Juneau above the national average. About 43 percent of American high school students have tried marijuana, according to a 2001 Youth Risk Behavior survey conducted by the federal Centers for Disease Control and Prevention.

In a similar survey given in 1999, 24 percent of JDHS student respondents said they had smoked pot in the previous month and 40 percent said they had consumed alcohol in the previous month. Adult alcohol consumption in Southeast Alaska is the highest in the country, Moore said.

"Twenty-seven percent of the high school (students) binge drank last month," Moore said, citing statistics from the 1999 survey. A binge-drinker consumes more than five drinks in a sitting.

JDHS Assistant Principal Laury Roberts Scandling disciplines students caught with controlled substances. She is more conservative with her estimate of the frequency of student drug use, saying statistics she has seen indicate drug use is decreasing. A comparison of the 1999 and 1995 Youth Behavior Risk surveys, for example, shows a decrease in marijuana and alcohol use.

"Chances are we would be about average. ... I wouldn't call it a crisis," she said. "We just don't have accurate data."

No comprehensive survey of Juneau's teenage drug use has been done since the school participated in the national Youth Behavior Risk survey in 1999, because the Alaska Legislature passed a law that made such surveys require positive parental permission, Scandling explained.

Previously, parents were given the option to object to the survey and to request their child be excluded. When high school officials sent out permission slips, only 30 were returned, Scandling said, making an accurate survey of the roughly 1,600 students impossible.

Without the survey, there is no way to know what the numbers are, she said. Moore and Scandling said students involved with drugs often perceive drug use as more pervasive that [sic] it is.

Bucking stereotypes about students who use drugs, the group of students described themselves as "involved," participating in more then one extra-curricular school activity. They had ties to school leadership organizations like student government and sports teams. All were college-bound. Their median grade point average is 3.75.

"I used to worry about pot (affecting my brain) but then I got a (very high score) on my SATs and now don't care," said one student.

Moore also said students don't realize that the health effects of habitual pot smoking may not be apparent immediately. On tests, pot-smoking students scored lower in areas that looked at short-term memory, the ability to think in new models, and reading comprehension, Moore said.

The school district has a strict, multifaceted policy with regard to substance abuse. Students who are caught drunk, high or in possession at school are reported to their parents and the police and are suspended. Drinking can result in a ticket; possession can result in an arrest. Three drug offenses can mean a student is expelled. Students also are given an intervention plan that involves drug education classes and some counseling.

With the new system being developed by the JEPP group, every student who commits a drug-related offense will be assessed to determine the level of his or her problem and given an 80-hour intervention plan tailored to his or her

specific needs with oversight by a case manager. A student with a serious substance abuse or chemical dependency problem may receive more counseling and referral to community drug abstinence support groups like Alcoholics Anonymous, Alanon and Narcotics Anonymous. A student who is not addicted to alcohol or other drugs might have a plan that includes preventative education and community service.

Currently all students who participate in school activities, from cheerleading to student government, must sign a "disassociation policy" in which they agree not to use drugs or alcohol or hang out with people who do. If an administrator can confirm that a student is at a party where alcohol is present, the student can be banned from an activity for 30 days. All the students interviewed were aware of this policy, and objected strongly to it.

"It basically means that there can be no such thing as a designated driver," one of the students said.

For the students interviewed who said they smoked pot, cost rather than getting in trouble or health concerns served as a prohibitive factor for drug and alcohol use.

"I'm pondering 'E,' I don't really want to pay 30 or 40 bucks a pop," the young woman said, referring to the drug ecstasy.

Students also said that for the most part, pot and other drugs were available to them at school from other students who deal. "Enough pot to get high" costs about $20, they said.

"You could probably get it for free if you are pretty. I never pay for drugs," said the female JDHS student.

Juneau Police officer Blain Hatch patrols the school and deals with drug complaints. He said more than half of the students likely will try marijuana before graduation. He said he hasn't seen any evidence drug use is increasing. Over the last two years, he's arrested a dozen or so students for

possession of marijuana, and says he routinely confiscates pot pipes.

"Hands down, marijuana and alcohol are the most prevalent (drugs used by high school students)," he said, noting he has heard rumors about use of drugs such as methamphetamines, ecstasy and cocaine. He also had an incident with a student who became violent after taking DXM.

Alcohol is the most dangerous drug, Hatch said, because it is the most prevalent and because intoxicated students may become violent or get behind the wheel. Students generally get drugs and alcohol from acquaintances or parents, he said.

One of the students interviewed said his parents were aware that he experiments with drugs. Others said their parents had no idea - and would be upset if they did know. All characterized school attempts to dissuade drug use as ineffective. The young man who didn't smoke pot said he abstained out of guilt, choosing alcohol instead because it was more accepted.

"When you smoke pot, you feel like you have lost something you had before," he said. "I don't want to feel like I've lost something."

The students who smoke pot characterized their use as recreational, saying they smoked to "have fun," "relax," or because drinking alcohol had become boring.

"I only have fun about a quarter of the time when I am stoned," said one young man. "We know that it is stupid, but we will probably do it in college."

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OFFICE OF NATIONAL DRUG CONTROL POLICY - DRUG FACTS

[Exhibit 1 to Defendants' Memorandum in Support of Defendants' Cross-Motion for Summary Judgment]

Drug Facts

Office of National Drug Control Policy

[Logos and Hyperlinks Omitted]

Street Terms: Drugs and the Drug Trade

Drug Type: Marijuana

STREET TERM	DEFINITION
3750	Marijuana and crack rolled in a joint
420	Marijuana use
A-bomb	Marijuana cigarette with heroin or opium
Acapulco gold	Marijuana from S.W. Mexico; marijuana
Acapulco red	Marijuana

* * * * *

Bomber	Marijuana cigarette
Bone	Marijuana; $50 piece of crack
Bong	Pipe used to smoke marijuana
Boo	Marijuana; methamphetamine
Boo boo bama	Marijuana

* * * * *

Herb and Al	Marijuana and alcohol
Herba	Marijuana
Hit	To smoke marijuana; marijuana cigarette; Crack Cocaine
Hit the hay	To smoke marijuana
Hocus	Marijuana; opium

* * * * *

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IN THE

Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools, at school-sponsored, faculty-supervised events, to prohibit students from displaying messages promoting the use of illegal substances.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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OPINIONS BELOW

The orders of the United States District Court for the District of Alaska (per Sedwick, C.J.) granting petitioners' summary judgment motion are reprinted at Pet. App. 23a-44a and are reported at 2003 WL 25274689 and 2003 U.S. Dist. LEXIS 27270. The Ninth Circuit's decision reversing the district court is reprinted at Pet. App. 1a-22a and is published at 439 F.3d 1114. The court of appeals' order denying rehearing and rehearing en banc is reprinted at Pet. App. 45a-46a and is not otherwise published.

JURISDICTION

The Ninth Circuit rendered its decision on March 10, 2006, and denied rehearing and rehearing en banc on April 18, 2006. Justice Kennedy extended the time to file a petition for a writ of certiorari to and including August 28, 2006. The petition for a writ of certiorari was filed on August 28, 2006, and was granted on December 1, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Title 20, Sections 7101 *et seq.* of the United States Code, codifies the Safe and Drug-Free Schools and Communities Act, pertinent parts of which are reprinted at Pet. App. 47a-51a.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Juneau School Board Policy 5520, reprinted at Pet. App. 53a-54a, states, in pertinent part:

> The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .

Juneau School Board Policy 5850, reprinted at Pet. App. 58a, states, in pertinent part:

> Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program.

STATEMENT OF THE CASE

A. Factual Background

1. January 24, 2002 marked the first time in Olympic history that the Olympic Torch Relay visited Alaska. Charles Bingham, *The Olympic Torch Relay comes to Juneau*, Juneau Empire, Jan. 16, 2004, available at http://juneauempire.com/stories/011602/spo_juneaurelay.shtml. In preparation, a local task force of approximately two dozen local civic leaders planned for Juneau's participation in the

international event—a ten-mile relay through Juneau. *Id.* Members of the city government, including the mayor's office and the Juneau Department of Parks and Recreation, lent their support. *Id.* Local businesses, as well as national sponsors of the torch relay, supported the event. *Id.* The torch ceremony involved a week of community festivities. *A weeklong celebration of the Olympic spirit*, Juneau Empire, Jan. 16, 2002, available at http://juneauempire.com/stories/011602/spo_calendar.shtml. Upon its arrival in Juneau, the Olympic flame was welcomed by Tlingit Clan dancers, transported in a native canoe around Gastineau Channel, and carried through several miles of Juneau's streets, including past the State Capitol and the Juneau-Douglas High School. *The torch's route through Juneau has 3 segments*, Juneau Empire, Jan. 16, 2002, available at http://juneauempire.com/stories/011602/spo_torchroute.shtml.

Believing that the Olympic Torch Relay had noteworthy educational value (as well as high significance to the community), the Juneau School District allowed students to observe and participate in the ceremony. Pet. App. 34a. In addition, the School District allocated funds to transport students from schools not along the relay route to locations where they could view this memorable event. Pet. App. 63a.

After classes convened on the morning of the event, Juneau-Douglas High School administrators and teachers accompanied students from their classrooms to view the relay as it passed on Glacier Avenue in front of the school. Pet. App. 24a-25a, 34a. Once outside the classroom, the students were allowed to be in only one place—in front of the school, either on campus or lined along either side of the street. J.A. 23-24, 47-56. At all times, the student body remained under the supervision of high school administrators, teachers, and staff. *Id.*

During the event, high school cheerleaders were out in uniform to greet the torchbearers. Pet. App. 34a. The high

school pep band played. *Id.* Four high school students, representing various segments of the student body, acted as torchbearers. J.A. 23. In that role, the student torchbearers carried the Olympic flame as a small part of the 11,500-person chain of torchbearers who transported the torch along the 65-day, 46-State, 13,500-mile relay route. Bingham, *supra.*

2. Joseph Frederick, a Juneau-Douglas High School student, and several of his schoolmates positioned themselves on the sidewalk opposite the campus to await the torch relay. Pet. App. 25a. Before the torch arrived, Principal Deborah Morse approached this group to investigate the throwing of snowballs and beverage bottles that originated from their vicinity. J.A. 24, 41, 43. As the torchbearers and television camera crews approached, Frederick and his friends unfurled a large banner emblazoned with the phrase "BONG HiTS 4 JESUS." Pet. App. 25a. Frederick's banner—which measured (by his estimation) 14 feet long—was clearly visible to the large number of students assembled on campus. J.A. 24; Pet. App. 70a; Opp'n to Pet. at 1 n.1.[1]

a. "Bong" is a slang term for drug paraphernalia commonly used for smoking marijuana. J.A. 24, 59-60, 117. A "bong hit" is slang for inhaling marijuana from such a device. Pet. App. 4a; J.A. 24, 60-61. The term "bong hits" is widely understood by high school students (and others) as referring to smoking marijuana. Pet. App. 38a, 61a-62a; J.A. 24, 60-61. Frederick himself testified that "[m]any people

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[1] At the certiorari stage, respondent attempted to recast the banner incident as involving himself and several non-students. *See* Opp'n to Pet. at 11 (stating he was "joined with non-students to display a banner"). The record evidence identified only one non-student who may have been involved in the incident. Pet. App. 70a; J.A. 29, 35, 36.

reference [the phrase 'bong hits'] to drugs." J.A. 63. He also conceded that he "knew it was a possibility" that people would "interpret . . . bong hits as related to drugs" and that "there is a general amount of people who can understand the meaning of it [as a drug reference]." J.A. 61, 64. The combination of the phrases "bong hits" and "4 Jesus," according to Frederick, was intended to be a publicity stunt—something "controversial and yet ultimately meaningless." J.A. 66-67. "Christian people," he explained, "I believe they are anti-drugs, so if you put that together, it's somewhat ironic." J.A. 67. He further acknowledged that "some people might have taken offense." J.A. 63.

b. Prior to displaying the banner, Frederick had been absent from school. Pet. App. 25a. Having skipped his first class of the day, Frederick later claimed that his car was stuck in the snow. Pet. App. 64a. Frederick neither called the school to report his absence, nor informed the office of his presence when he arrived. *Id.*; J.A. 72-73. Frederick made no secret of the fact that, in positioning himself near the school to await the relay, he was purposely avoiding going onto school grounds. J.A. 28-29, 73. Although he could have selected any number of locations to unfurl his banner along the Olympic Torch's ten-mile journey through Juneau, Frederick chose instead to position himself in front of the student body and to display the banner where it would be in full view of the assembled students.

c. Spotting the drug-related display, Principal Morse approached Frederick and his friends and asked them to drop the banner. Pet. App. 25a. While other students complied with the request, Frederick refused to take it down. *Id.* Frederick claimed he had a First Amendment right to display the banner because he was not physically on campus. J.A. 24-25. Principal Morse responded that Frederick was participating in a school activity and that the banner was inappropriate. Pet. App. 3a; J.A. 25. When Frederick

refused to put the banner down, Principal Morse began rolling it up and directed Frederick to accompany her to her office. Pet. App. 25a; J.A. 10, 16. Frederick let go of the banner and walked the other way. Pet. App. 25a.

Frederick did not meet with Principal Morse until he was later summoned out of class and escorted to her office. There, Ms. Morse again explained that the banner was inappropriate in that it violated the school's policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs. Pet. App. 3a; J.A. 25. During the meeting, Frederick displayed a belligerent attitude and gave evasive and mocking answers to her questions. Pet. App. 65a. He told her, for example, that the banner was an acronym for "Better Olympic National Games – Head into Town 4 Jesus." Pet. App. 61a; J.A. 25-26; S.E.R. 35.[2]

After discussing the incident with a defiant and uncooperative Frederick, Principal Morse suspended him for ten days based on multiple infractions, including refusal to respond to a staff directive, truancy/skipping class, defiance/ disruptive behavior, and refusal to cooperate/assist in investigation, in addition to the underlying charge of displaying the offensive banner. Pet. App. 59a, 66a-67a. Ms. Morse provided Frederick with a written Notification of Suspension, which listed the grounds for his punishment and advised him that he had the right to appeal. J.A. 106-07.

Following the banner episode, school personnel reported several incidents of pro-drug graffiti in the halls and on school grounds, including references to and mimicry of Frederick's banner. Pet. App. 2a; J.A. 43.

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[2] "S.E.R." refers to the Appellees' (Petitioners') Supplemental Excerpts of Record in the Ninth Circuit.

3. The student conduct rules enforced by Principal Morse are published in the school district policies and the student handbook. Pet. App. 52a-58a; J.A. 80-105. In its policies, the Juneau School Board explicitly recognizes that students have "constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly." Pet. App. 53a (Juneau Sch. Bd. Policy 5520). In that context, forbidden expressive conduct includes activities "that interfere[] with the orderly operation of the educational program," such as "any assembly or public expression that . . . advocates the use of substances that are illegal to minors." *Id.* Messages promoting illegal drugs, alcohol, and tobacco are likewise prohibited on student clothing and in student publications because such messages are "inconsistent with the district's educational mission and disruptive to the district's educational program." Pet. App. 52a, 56a.

These policies are consistent with federal law, namely 20 U.S.C. § 7114(d)(6), which requires school districts receiving federal funds through the vehicle of the Safe and Drug Free Schools and Communities Act to certify periodically that their programs "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." The Juneau School District receives funds through this statutory mechanism and has complied with federal certification requirements. *See* S.E.R. 52-63. Indeed, the School Board promulgated a district-wide health and safety curriculum emphasizing the dangers of illegal drug and alcohol use. J.A. 80, 83-84. The Board also established detailed policies for prevention, intervention, and discipline of students engaging in the illegal use or possession of drugs or alcohol. J.A. 84-96.

In addition, the Board policies more generally address disorderly and disruptive behavior. J.A. 81-83. Under the policies, Principal Morse was authorized "to take such means as may be reasonably necessary to control the disorderly

conduct of students in all situations and in all places where such students are within the jurisdiction of the school district." J.A. 96. Students are required, among other things, to "comply with the reasonable directives" of administrators and teachers when the students are under school authority. J.A. 82. The student handbook discipline plan enumerates infractions that may result in punishment, including all the infractions for which Frederick was suspended. J.A. 100-07.

These student conduct rules are not confined to activities in the classroom or on campus: "Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program." Pet. App. 58a (Juneau Sch. Bd. Policy 5850); *see also* J.A. 100, 103 (defining infractions as including those committed "at school sponsored/sanctioned functions or activities").

The Board develops and periodically reviews these policies pursuant to a public, collaborative process that includes students, parents, teachers, and others responsible for student safety. J.A. 22, 98. In adopting standards for student behavior, the Board strives to "reflect community standards." J.A. 98.

B. Procedural History

1. Frederick appealed his suspension to Superintendent Gary Bader. Pet. App. 25a. Following a hearing in which Frederick was represented by counsel, Superintendent Bader issued a seven-page decision that upheld the principal's disciplinary actions. Pet. App. 59a-67a.

First, the superintendent concluded that Frederick violated the school policy against the display of offensive material. Pet. App. 63a. Specifically, Superintendent Bader determined that (i) Frederick was participating in a school activity; (ii) the banner "advocat[ed] the use of illegal drugs"

and Frederick was unable or unwilling to express any other credible meaning for the phrase; (iii) discouraging drug use is an important, longstanding component of the school's curriculum and is expressly incorporated into the district's student conduct policies; and (iv) the banner "was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage drug use." Pet. App. 61a-63a. The superintendent's opinion analyzed in detail this Court's student speech doctrine as articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Applying that body of law, Superintendent Bader concluded that Principal Morse's discipline of Frederick was consistent with controlling authority. Pet. App. 60a-62a.

Second, the superintendent determined that Frederick ran afoul of the school policy on truancy when he skipped class. Pet. App. 64a. Mr. Bader nonetheless noted that this unexcused absence, standing alone, likely would not have led to suspension. Pet. App. 67a. *Third*, the superintendent found that Frederick exhibited a "belligerent attitude" and "defiant" and "disruptive" behavior when he "set his own conditions for compliance" with Principal Morse's directive to accompany her to her office. Pet. App. 64a-65a. *Fourth*, he agreed that Frederick was uncooperative and evasive when the principal attempted to gather facts about the banner incident, but opined that great weight would not be placed on that particular infraction. Pet. App. 65a-66a. *Fifth*, Superintendent Bader found that Frederick refused to respond to a staff directive by withholding the banner when Principal Morse asked him to surrender it. *Id.*

The superintendent observed, *finally*, that Frederick "has a history of defiant behavior and has been suspended from

school for defiance before." *Id.* Mr. Bader concluded that Frederick's conduct warranted discipline and that the suspension was justified. Pet. App. 67a. In treating certain infractions with lenience, however, Superintendent Bader reduced Frederick's suspension to eight days. *Id.*

2. Frederick appealed to the School Board. Pet. App. 26a. Following a lengthy hearing with both witness testimony and legal argument, the School Board unanimously upheld the superintendent's decision. Pet. App. 26a, 69a.

3. Frederick filed a § 1983 action in the United States District Court for the District of Alaska. Frederick's complaint alleged that Principal Morse and the Juneau School Board violated his free speech rights under both the First Amendment and the Alaska Constitution. J.A. 12-13. Frederick sought injunctive relief, as well as compensatory and punitive damages. J.A. 13. He claimed that the seizure of the banner and subsequent disciplinary actions caused him "emotional distress, humiliation, loss of enjoyment of life, and mental anguish." J.A. 12.

On May 27, 2003, Chief Judge John W. Sedwick granted summary judgment in favor of petitioners. Pet. App. 23a-40a; *see also* Pet. App. 41a-42a. Shortly thereafter, on May 30, 2003, the court entered judgment dismissing the action. Pet. App. 43a-44a. In a detailed opinion, Chief Judge Sedwick concluded that the Juneau school officials did not in any fashion violate Frederick's First Amendment rights. From the outset, the district court emphasized that Frederick's complaint involved a student speech case:

> [T]here is no issue of fact as to whether or not this was a school-sponsored activity. . . . [Principal Morse] authorized the teachers to take their classes to view the relay. . . . [T]eachers and administrative officials monitored students' actions. . . . The relay occurred during school

> hours, at a time when parents expected their children to be under school supervision.
>
> . . . [T]he fact that Frederick joined his fellow classmates at the school-sponsored event meant that he was attending a school-sponsored activity.

Pet. App. 34a-35a.

Having determined that Frederick was a student subject to the school's authority during school hours, the court reasoned that the banner's message could be constitutionally prohibited under this Court's decision in *Fraser*, 478 U.S. 675. Pet. App. 33a-38a. *Fraser*, the district court explained, allows a public school to regulate speech that it reasonably interprets as "plainly offensive" because such speech "might undermine the school's basic educational mission." Pet. App. 36a. The court noted that Frederick's banner "directly contravened the Board's policies relating to drug abuse prevention" and thus interfered with the school's educational mission to deter illegal drug use. Pet. App. 35a-36a. The court highlighted readings of *Fraser*, such as in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), where the Sixth Circuit concluded that a school could prohibit t-shirts depicting a rock band that promoted a drug-using lifestyle. Pet. App. 36a.

The district court further observed that *Tinker*, 393 U.S. 503, justified Principal Morse's actions. Pet. App. 35a-36a. In the trial court's view, *Tinker* allows schools to curtail speech that interferes with a school's work and, "[w]ithout a doubt, part of the school's work is to deter drug and alcohol abuse." Pet. App. 36a. Underlying the district court's First Amendment analysis was an acknowledgement of the importance of deferring to school administrators' reasonable judgments where, as here, Frederick chose to display his banner at a "school-sponsored" activity. Pet. App. 33a-38a.

Finally, the district court concluded, under both this Court's precedents and Alaska law, that petitioners were immune from claims for money damages. Pet. App. 27a-32a. The court noted that (i) no case law was on point to establish that Principal Morse's actions were unconstitutional; (ii) the cases cited by Frederick were all readily distinguishable; and (iii) Principal Morse's actions were not "so far-fetched as to make the illegality apparent." Pet. App. 27a-30a. Quite the contrary, the trial court observed that existing case law "shows that it was objectively reasonable for defendants to believe that their actions were proper." Pet. App. 28a.

4. The Ninth Circuit reversed. The court of appeals acknowledged that the banner incident occurred while "Frederick was a student, and school was in session." Pet. App. 6a-7a. Accordingly, in the Ninth Circuit's view, this case was not about "speech on a public sidewalk." Pet. App. 5a. To the contrary, this Court's student speech doctrine under *Tinker*, Fraser, and *Kuhlmeier* fully applied. Pet. App. 1a, 5a-6a. The court further assumed that Principal Morse correctly interpreted the phrase "BONG HiTS 4 JESUS" as "express[ing] a positive sentiment about marijuana use." Pet. App. 6a-7a.

The panel ruled, however, that the district court incorrectly applied *Fraser*'s "plainly offensive" standard. The court narrowly interpreted *Fraser* as allowing only prohibitions on student speech of a "sexual nature." Pet. App. 9a. Applying that circumscribed standard, the court concluded: "Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones)." *Id.* According to the panel, the school district's policy of suppressing pro-drug messages was, on the other hand, just one of any number of "social message[s] contrary to the one favored by the school." That being so, in the Ninth Circuit's view, a school district is "not

entitled to suppress speech that undermines whatever mission it defines for itself." Pet. App. 7a, 12a.

The court of appeals further determined that *Kuhlmeier*, which acknowledged schools' ability to regulate the content of school-sponsored speech, 484 U.S. at 273, was inapplicable. Pet. App. 10a-11a. The panel noted that, here, Frederick displayed the banner off school property, in what the court characterized as a "non-curricular activity" that was only "partially supervised."[3] Pet. App. 10a-11a, 17a. Thus, even though characterizing the relay as a "school authorized" activity, Pet. App. 7a, the court below did not view the banner as speech that was either sponsored or endorsed by the school. Pet. App. 10a.

Having eliminated *Fraser* and *Kuhlmeier* as bearing on the analysis, the Ninth Circuit concluded that the case was governed solely by *Tinker*. Under the rationale of that watershed decision, the court of appeals opined that petitioners could not punish Frederick for displaying his banner absent a showing that the banner "disrupts the good order necessary to conduct [the school's] educational function." Pet. App. 12a. The panel concluded that petitioners could not demonstrate the requisite element of

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[3] The Ninth Circuit did not identify any error in the district court's findings that teachers and administrators monitored and supervised students during the torch relay event. The court of appeals, however, described the event as "partially supervised" based on affidavits from a few of Frederick's friends who claimed that some of the 1,000-plus Juneau-Douglas High School students left the event or were otherwise unruly. Pet. App. 2a, 17a; J.A. 32, 36-38. As the district court observed, these student affidavits did not contradict evidence presented by the school district that set forth in detail the supervisory roles of administrators and teachers. Pet. App. 34a; *see* J.A. 23-24, 47-56. Notwithstanding the Ninth Circuit's circumlocution, it is undeniable that there was official school supervision at the relay event.

"disruption." In consequence, as the Ninth Circuit saw it, petitioners had violated Frederick's First Amendment rights. Pet. App. 18a.

The court of appeals further concluded that Principal Morse was not entitled to qualified immunity. In the panel's view, the case law "succinctly explained how to apply the various Supreme Court doctrines . . . , thus ensuring that opacity in this particular corner of the law has been all but banished." Pet. App. 20a. Having found a constitutional violation, the Ninth Circuit determined that Principal Morse violated Frederick's "clearly established rights." *Id.* The panel thus vacated the district court's judgment and remanded to determine Frederick's monetary damages. Pet. App. 22a.

5. The Ninth Circuit subsequently denied the petition for rehearing and rehearing en banc. Pet. App. 45a-46a. On August 28, 2006, the Juneau School Board and Ms. Morse filed a Petition for a Writ of Certiorari in this Court. On December 1, 2006, the Court granted the petition.

SUMMARY OF ARGUMENT

In reversing the district court's grant of summary judgment in favor of the Juneau School Board and Deborah Morse, the Ninth Circuit embraced an unduly narrow reading of this Court's teachings with respect to the free speech rights of public school students. To make very bad matters profoundly worse, the court below fashioned an approach to qualified immunity doctrine that conflicts with this Court's precedents and is dangerously unsettling to thousands of public school educators and administrators across the country. The Ninth Circuit was doubly wrong.

In its teachings with respect to student speech principles, this Court has consistently recognized that public educational institutions possess "special characteristics" that profoundly shape the contextually-sensitive contours of Free Speech

doctrine. From its watershed decision in *Tinker*, 393 U.S. 503, through its subsequent decisions in *Fraser*, 478 U.S. 675, and *Kuhlmeier*, 484 U.S. 260, this Court has both protected nondisruptive political speech by students, while respectfully deferring to school administrators' judgments in cabining expression that is inconsistent with the educational function of public schools.

In its First Amendment analysis, the Ninth Circuit fundamentally misconceived the nature and scope of the mission of public education in this country—as elucidated by this Court in both *Fraser* and *Kuhlmeier*—and, at the same time, wildly enlarged the ambit of purportedly political speech. In doing so, the court of appeals substituted its unforgivingly libertarian worldview for the considered judgment of school officials (and school boards) in seeking, consistent with Congress' statutory mandate, to foster and encourage a drug-free student lifestyle. Frederick's banner display not only radically changed the subject from the Olympic Torch Relay ceremony to illegality-promoting, distracting banter, his message itself lay far outside the province of *Tinker*-protected political expression.

To the contrary, as Chief Judge Sedwick rightly concluded, the banner's ambiguous but obtrusive message fell comfortably within the ambit of *Fraser*'s focus on promoting appropriate norms of discourse and civility. *Kuhlmeier* likewise supports the school authorities' decision to just say no to respondent's whimsically drug-focused message, inasmuch as the banner—if left undisturbed—could have told not only the high school student body but the larger community that drug-use promotion is openly tolerated within the local public high school. Nothing in law or logic, much less common sense, requires such an extravagant result.

The Ninth Circuit also strayed from this Court's qualified immunity jurisprudence, as embodied in decisions such as

Saucier v. Katz, 533 U.S. 194 (2001). The court of appeals' conclusion that Deborah Morse, a paradigmatic conscientious educator and administrator, should face a potentially ruinous award for money damages, by virtue of her enforcement actions directed against respondent, cries out for the Court's muscular disapprobation.

As a threshold matter, for reasons already adumbrated, the court of appeals fell into error as a matter of substantive First Amendment law. With that foundation removed, the edifice of potential personal liability for money damages entirely collapses. Even assuming arguendo, however, that Principal Morse was in constitutional error in enforcing the School Board's anti-drug-message policies, the Ninth Circuit was still mistaken in its articulation and application of qualified immunity principles. Under this Court's objective test, immunity doctrine provides a shield from civil damages suits unless "it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Principal Morse abundantly satisfies that objective standard. Responsible for maintaining order and proper decorum at a celebratory gathering of more than 1,000 high school students, the principal was confronted with a flagrant, inherently disruptive violation of a written school policy proscribing pro-illegal-drug messages. She responsibly took the appropriate action to ensure that the Olympic Torch Relay event was not further disrupted by Frederick's pro-drug banner. Nor does the fact that Frederick was not physically on school grounds at the time of the banner display exempt him from school discipline. At the pivotal moment when engaging in his expressive conduct, Frederick was a student participating in a school activity during school hours. A reasonable principal could well have believed that enforcing a well-established policy against promoting illegal

substances at a non-classroom school activity was entirely lawful, and indeed required by School Board mandate. By doing so, the principal acted entirely reasonably. Accordingly, her conduct should, under this Court's body of qualified immunity jurisprudence, be fully immunized from judicial condemnation.

ARGUMENT

Under challenge to address declining academic performance in the age of globalization, American public education finds itself—even at a time of war—as a vitally important subject in the unfolding democratic conversation about the Nation's future. The Ninth Circuit's destabilizing decision in this sensitive arena renders all the more daunting the vital task of teachers, administrators, and volunteer school board members in attending holistically to the needs of millions of students entrusted every school day to their charge. In reversing the district court's grant of summary judgment in favor of the Juneau School Board and Deborah Morse, the Ninth Circuit has dramatically altered the legal landscape of public education law in the United States. As to both the First Amendment and the law of qualified immunity, the court of appeals' uncompromisingly libertarian vision is deeply unsettling to public school educators across the country. The decision below is doubly—and dangerously—wrong. The judgment should be reversed.

I. THE JUNEAU SCHOOL OFFICIALS DID NOT VIOLATE FREDERICK'S FIRST AMENDMENT RIGHTS WHEN THEY DISCIPLINED HIM FOR VIOLATING SCHOOL POLICIES AGAINST PROMOTING ILLEGAL SUBSTANCES AT A SCHOOL ACTIVITY.

A. The "special characteristics" of the school setting require deference for school officials' actions.

Throughout the fifty States (and the District of Columbia), public education serves what this Court long ago described as "a principal instrument in awakening the child to cultural values." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Through government-operated educational institutions, large and small, the vast majority of young Americans are prepared "for later professional training" and for "adjust[ing] normally to [their] environment." *Kuhlmeier*, 484 U.S. at 272 (quoting *Brown*, 347 U.S. at 493). Those who serve as teachers and administrators in this challenging environment are tasked with a weighty and delicate responsibility. In prescribing and controlling student conduct, public educators are inexorably required to balance students' constitutionally-guaranteed liberties with the bedrock duty to educate young minds, including fashioning "the boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681. Pursuit of these goals inevitably requires authorities to regulate speech, symbolic and otherwise, in a manner impermissible outside the school setting. *Id.* at 682; *accord Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding high school's random suspicionless drug testing policy); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (permitting random drug testing of high school student athletes).

In the First Amendment context, this Court has long emphasized that the rights of students in the public schools "are not automatically coextensive with the rights of adults in

other settings." *Fraser*, 478 U.S. at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-342 (1985)). Thus, while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," students' rights must be "applied in light of the *special characteristics* of the school environment." *Tinker*, 393 U.S. at 506 (emphasis added). The "uninhibited, robust, and wide-open" free speech in adult discourse, as ordained in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), is manifestly different from the latitude accorded to schoolchildren in a "custodial and tutelary" environment. *Vernonia*, 515 U.S. at 655.[4]

As this Court has acknowledged on numerous occasions, the resolution of conflicts arising in the daily operation of school systems "is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273 (citations omitted). Only when a decision to censor student expression has no valid educational purpose is the First Amendment so "*directly and sharply implicate[d]*" as to require judicial intervention to protect students' constitutional rights. *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Thus, in discerning the proper doctrinal limitations upon the

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[4] So staunch a defender of the "marketplace of ideas" as John Stuart Mill saw this delineation in his theories on individual liberty:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.

John Stuart Mill, *On Liberty* 69 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

baseline liberty guaranteed by the Free Speech Clause, a guiding principle unifying this Court's teachings is that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" *Id.* at 266 (citing *Fraser*, 478 U.S. at 685). Firmly embedded in this Court's student speech jurisprudence, that overarching principle is the beginning and end of this case.

1. *Tinker* protects speech that does not intrude upon the work of the schools.

The framework for student speech doctrine begins with *Tinker*. In that landmark case, the Court upheld the free speech rights of three students to wear anti-war armbands during the school day as a silent, passive political protest. 393 U.S. at 514. The Court reasoned that wearing black armbands, a traditional sign of mourning, was expressive conduct akin to pure speech, which is entitled to comprehensive protection. *Id.* at 505-06. At the same time, the *Tinker* majority recognized the unique characteristics of a public school and the unavoidable reality that administrators and teachers may suppress student speech, whether in class or out of it, that "intrudes upon the work of the schools or the rights of other students." *Id.* at 508. In the record before it, however, the Court could discern no evidence that the passive wearing of two-inch armbands disrupted school operations. *Id.*[5]

The *Tinker* Court had no occasion to spell out in detail the extent or nature of "disruption" necessary to trigger a

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[5] Justice Fortas' majority opinion described student reaction to the armbands as provoking "no threats or acts of violence" other than a "few . . . hostile remarks." *Id.* at 508. In dissent, Justice Black found, to the contrary, that the evidence did support a finding of disruption, namely, that, in addition to hostile comments, student attention was diverted in classrooms. *Id.* at 517-18 (Black, J., dissenting).

school's authority to curtail student speech. The Court described the requisite disruption as "interference, actual or nascent, with the schools' work," which is something more than "undifferentiated fear or apprehension of disturbance." *Id.* Under this standard, if a school administrator reasonably perceives (or forecasts) that a student's expressive conduct is presently interfering (or would eventually interfere) with the school's work, then the administrator is warranted in suppressing the particular expression (or expressive conduct). *Id.* Student speech rising to this level of disruption may occur "in class or out of it" and may "stem[] from time, place, or type of behavior." *Id.* at 513. The Court provided further guidance by distinguishing John Tinker's silent, passive conduct from the disciplinary problems posed by "aggressive, disruptive action or even group demonstrations." *Id.* at 507-08. The *Tinker* Court thus foreshadowed its willingness to approve school intervention when speech is accompanied by antisocial conduct.

Justice Black dissented. He lamented that the broad sweep of the majority decision invited students to "use the schools at their whim as a platform" and that courts, rather than schools, "will allocate to themselves the function of deciding how the pupils' school day will be spent." *Id.* at 517 (Black, J., dissenting). Although his opinion failed to carry the day, Justice Black's plain-spoken words continue to echo through the body of student speech law.

2. *Fraser* permits schools to prohibit student speech that undermines the basic educational mission.

Fraser—the second stage of the student speech decisional trilogy—assured school officials that they retain authority to proscribe student speech that is vulgar, lewd, indecent, obscene, or plainly offensive, even absent a showing of material and substantial disruption to school discipline. 478 U.S. at 683-84. Drawing from *Tinker*, the

Fraser Court emphasized that inculcating habits and manners of civility—through discouraging offensive language—is "truly the 'work of the schools.'" *Id.* at 683 (quoting *Tinker*, 393 U.S. at 508). To force a school to tolerate indecorous student speech, wrote Chief Justice Burger, "would undermine the school's basic educational mission." *Id.* at 685.

Applying this principle, the *Fraser* Court reversed the Ninth Circuit's contrary judgment and upheld a public high school's disciplining a student for delivering a sexually suggestive nominating speech for a student government candidate at a voluntary school assembly. *Id.* That speech referred to the candidate in terms of "an elaborate, graphic, and explicit sexual metaphor," though the speaker's saucy presentation employed neither profanity nor obscenity. *Id.* at 677-78. Under the circumstances, the Court determined that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. On that note, the Court embraced Justice Black's broad teaching in *Tinker* that "the Federal Constitution [does not] compel[] . . . teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Id.* at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

Emphasizing that not all types of speech are accorded identical protection, particularly in view of the "special characteristics" of the educational setting, the *Fraser* Court recognized "the marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Matthew Fraser's] speech." *Id.* at 680. The Court acknowledged that some speech is properly subject to age-appropriate restrictions: "[Fraser's sexually explicit] speech could well be seriously damaging to its less mature audience,

many of whom were only 14 years old and on the threshold of awareness of human sexuality." *Id.* at 683.[6] In that regard, the *Fraser* Court echoed Justice Stewart's concurrence in *Tinker*, where the Justice from Cincinnati articulated the view that "[a] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Tinker*, 393 U.S. at 515 (Stewart, J., concurring) (quoting *Ginsburg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in result). Significantly for First Amendment analysis, Fraser's ribald electioneering pronouncements fell well below the standards for "obscenity" established in adult contexts. *See, e.g., Miller v. California*, 413 U.S. 15 (1973). The bedrock point from *Tinker* remained: The public education setting has "special characteristics" profoundly informing First Amendment analysis.

Justice Brennan concurred in the judgment. He agreed that, "under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's educational mission." *Fraser*, 478 U.S. at 688-89 (Brennan, J., concurring). In dissent, Justice Stevens similarly recognized the appropriateness of disciplining students for expressive conduct that conflicts with a school's educational mission. *Id.* at 691 (Stevens, J., dissenting). He opined that "a school faculty must regulate the content as

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[6] The rationale for giving due consideration to age appropriateness is rooted in the responsibilities of school authorities acting *in loco parentis*—parents may legitimately expect schools acting on their behalf to protect their children "from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684.

well as the style of student speech in carrying out its educational mission." *Id.* (Stevens, J., dissenting).[7]

3. *Kuhlmeier* allows student speech restrictions in school-sponsored activities when pursuant to legitimate pedagogical concerns.

Fraser's deferential approach to school officials' First Amendment calibrations was likewise embraced in *Kuhlmeier*. In this final stage of the Court's school speech trilogy, the Court acknowledged that school officials are entitled to exercise pervasive control over the style and content of student speech that reasonably might be perceived to bear the school's imprimatur. 484 U.S. at 273. Regulation of speech viewed as "school-sponsored"—on account of the school lending its name and resources to the activity—is permitted if the curtailment is reasonably related to "legitimate pedagogical concerns." *Id.* Thus, in *Kuhlmeier*, a school properly exercised its discretion in refusing to publish certain student articles on pregnancy and divorce in a school-funded student newspaper. *Id.* at 276. The Court concluded that suppression of the articles was reasonably related to the tripartite school objectives of (i) protecting the privacy of the individuals referenced in the articles; (ii) shielding younger students from inappropriate subject matter; and (iii) teaching journalistic fairness. *Id.*

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[7] Despite agreeing that Fraser's speech was inappropriate in certain school settings, Justice Stevens dissented on the grounds that Fraser's punishment under the school policy at issue did not comport with the Due Process Clause of the Fourteenth Amendment. *Id.* at 696 (Stevens, J., dissenting). Here, by contrast, Frederick's complaint advances no procedural due process claim. J.A. 8-13. Nor could it reasonably have done so. Frederick's free speech claim received lavishly elaborate treatment from both the Superintendent, Gary Bader, and the School Board. In addition, Frederick does not challenge the facial validity of the Juneau School Board policies. Pet. App. 7a.

The *Kuhlmeier* Court added that "[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use." 484 U.S. at 272. Alluding to *Fraser*'s emphasis on upholding schools' "educational mission," the majority recognized that promoting illegal substances was "inconsistent with 'the shared values of a civilized social order.'" *Id.* (quoting *Fraser*, 478 U.S. at 683). Thus, the Court left no doubt that discouraging illegal substance use reflected a legitimate pedagogical concern.

B. The *Tinker-Fraser-Kuhlmeier* trilogy permitted Juneau school officials to discipline Frederick for promoting illegal substances.

The case at hand fits comfortably within the framework of the school speech trilogy. In sharp contrast to Tinker's anti-war armband, Frederick's "bong hits" banner did not involve the passive expression of a political viewpoint. Rather, his slang marijuana reference was part of an antisocial publicity stunt designed to draw attention away from an important (and historic) school activity. The message that Principal Morse, Superintendent Bader, the unanimous School Board, and Chief Judge Sedwick all reasonably gleaned from this banner—and on which the Ninth Circuit proceeded—was that it expressed a positive sentiment about marijuana use. Frederick cannot reasonably contend otherwise. The message was therefore directly contrary to the school's basic educational mission of promoting a healthy, drug-free lifestyle (as expressed in written School Board policies). In the context of a school-sponsored activity, Principal Morse's restriction of this expression was indisputably consistent with an important pedagogical concern. The trilogy—when distilled to its essential principles—stands for the proposition that students have limited free speech rights balanced against the School District's right to carry out its educational mission and to

maintain discipline. Under this body of law, Frederick's claim to First Amendment protection falls woefully short.

1. Discouraging use of illegal substances is an undeniably important educational mission.

Preventing teenage drug use is a critical educational mission of our public schools. "That the nature of the concern is important—indeed perhaps compelling—can hardly be doubted." *Vernonia*, 515 U.S. at 661; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 599 (2001) (Souter, J., concurring in part and dissenting in part) ("[F]ew interests are more 'compelling,' than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance . . . ."). While drug abuse remains a serious problem with adults, the severity is even more pronounced with elementary and secondary schoolchildren:

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.

Vernonia, 515 U.S. at 661-62 (internal citations and quotation marks omitted). Troublingly, "[t]he drug abuse problem among our Nation's youth . . . has only grown worse" in recent years, thus "mak[ing] the war against drugs a pressing concern in every school." *Earls*, 536 U.S. at 834.

In view of this flinty reality, this Court has determined that "'special needs' . . . exist in the public school context" to justify overriding Fourth Amendment privacy interests that would otherwise apply outside the school setting. *Id.* at 843; *Vernonia*, 515 U.S. at 653. Accordingly, the majorities in *Earls* and *Vernonia* upheld random drug testing of students participating in extracurricular activities. 536 U.S. at 837-38; 515 U.S. at 664-65. These precedents once again confirmed that constitutional protections for schoolchildren are inexorably informed (and frequently diluted) by "the *special characteristics* of the school environment." *Tinker*, 393 U.S. at 506 (emphasis added).

Student free speech rights likewise appropriately yield when it comes to promoting illegal substances. "[T]he single most important factor leading schoolchildren to take drugs . . . [is] peer pressure." *Earls*, 536 U.S. at 840 (Breyer, J., concurring). Impressionable adolescents face strong inducements to use drugs as they are bombarded with pro-drug messages from classmates, adults, and the media. Remaining steadfastly consistent with the drug-free-lifestyle message is therefore particularly important while school is in session. Congress recognized this fact in passing the comprehensive Safe and Drug Free Schools and Communities Act, which supports local schools' drug prevention efforts and requires consistency of message that illegal drugs are "wrong and harmful." 20 U.S.C. § 7114(d)(6).

Consistent with Congress' mandate, thousands of local school boards across the country, much like Juneau's, have addressed the drug problem by crafting policies related to drug-abuse prevention, intervention, treatment, and discipline. Pet. at 17-21. These policies are adopted by duly-elected school board members through a public, deliberative process. The Juneau School Board, for example, is required by statute to develop and periodically review its policies

governing student rights and responsibilities. Alaska Admin. Code tit. 4, § 07.010. These student conduct rules must substantively and procedurally comply with applicable laws and regulations. *Id.* Through this exercise in constitutional self-government, a common prohibatory theme has emerged: Messages promoting illegal substances are not to be tolerated during school or any school activities. *See* Pet. App. 52a-58a (various anti-drug-message policies adopted in 1985, as revised).

Not surprisingly, lower courts addressing First Amendment challenges to anti-drug school policies had reached a bottom-line consensus—at least prior to *Frederick*. Several courts had recognized that prohibitions on pro-drug messages are constitutional because such expression is "plainly offensive" under *Fraser* and inconsistent with the mission of schools to promote healthy lifestyles (including by seeking at every turn to combat substance abuse). *See, e.g.*, *Boroff*, 220 F.3d at 471 (upholding ban on Marilyn Manson t-shirts because singer promoted drug use);[8] *Nixon v. N. Local Sch. Dist.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) ("Examples [of offensive speech under *Fraser*] are speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder."); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 859 (E.D. Mich. 2003) ("[W]hen student speech is . . . lewd, obscene, or vulgar (including related to alcohol or drugs), school officials may curtail that speech."); *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796, 798-99 (D. Idaho 1987)

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[8] Even the dissent in *Boroff* found agreement with the majority that a school could prohibit pro-drug messages. 220 F.3d at 474 (Gilman, J., dissenting) ("If the majority is suggesting that the School could have concluded that Marilyn Manson's apparent endorsement of, say, illegal drug use, makes his picture an unacceptable image for students to wear in high school, I would agree.").

(upholding prohibition of t-shirt depicting drunken administrators under *Fraser*, noting that schools have a duty to teach about harmful effects of alcohol).

Other courts have observed that there can be little dispute that messages promoting illegal substances cause disruption within schools. *See Williams v. Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980) (taking judicial notice that messages promoting drug use endanger students' health and safety; prohibiting distribution of underground newspaper containing drug paraphernalia advertisements); *cf. McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1420-21 (W.D. Okla. 1992) ("Reasonable school officials could forecast that the wearing of clothing bearing a message advertising an alcoholic beverage would substantially disrupt or materially interfere with the teaching of the adverse effects of alcohol and that its consumption by minors is illegal and/or would substantially disrupt or materially interfere with school discipline.").

Still other courts have upheld bans on pro-drug messages in the context of school-sponsored activities. *See Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1219 (11th Cir. 2004) (approving viewpoint discrimination in school-sponsored speech to forbid pro-drug messages); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (permitting school policy banning ads in school publications for tobacco and liquor products); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 920 (E.D. Mo. 1999) (upholding prohibition against school band playing song "White Rabbit" because it might "reasonably be perceived" to advocate the use of illegal drugs).

More broadly, discouraging drug use has been universally recognized and sanctioned by school boards, legislatures, and

courts (including this Court) as a permissible educational goal.[9] The *Frederick* decision appears to be the first case in American jurisprudence in which any court—federal or state—has stripped public school officials of authority to proscribe pro-drug messages.[10] This Court should remove any lingering doubt whether school authorities, pursuant to their basic educational mission, retain discretion to restrict student speech that is reasonably viewed as promoting or advocating the use of substances that are illegal to minors.

2. Frederick's pro-drug banner interfered with decorum by radically changing the focus of a school activity.

The *Fraser*-ordained value of preserving decorum in schools likewise stands as a permissible justification for

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[9] Courts have found sufficient justification in promoting temperance of minors that a State may regulate the placement of alcohol advertisements in public. In *Anheuser-Busch, Inc. v. Schmoke*, for example, the Fourth Circuit upheld Baltimore's ordinance banning outdoor alcohol advertising in certain areas where children are likely to walk to school or play in their neighborhood. 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). What a strange dichotomy if governmental entities, as sovereigns, are allowed to restrict commercial alcohol advertising, but schools, despite their "special characteristics," are required to tolerate the very same messages.

[10] We recognize that the Ninth Circuit's pioneering approach in *Frederick* is not without judicial admirers elsewhere. In *Guiles v. Marineau*, decided two days after the filing of the petition for certiorari in this case, the Second Circuit applied *Frederick* in holding that school authorities could not censor images of liquor bottles and cocaine on a student's t-shirt. 461 F.3d 320, 331 (2d Cir. 2006), *petition for cert. filed*, No. 06-757 (U.S. Nov. 28, 2006). The student's t-shirt contained what the Second Circuit deemed an "anti-drug message," which, in the court's view, could not be construed as "offensive" under *Fraser*. *Id.* at 329.

restricting student speech and for which school authorities traditionally are accorded wide discretionary latitude. *See Fraser*, 478 U.S. at 686 ("[M]aintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." (quoting *T.L.O.*, 469 U.S. at 340)).[11] Discipline stemming from the time, place, or manner of a student's expressive conduct in no wise offends the First Amendment when the school has an interest in ensuring that school activities "proceed in an orderly manner." *Fraser*, 478 U.S. at 689 (Brennan, J., concurring in judgment); *cf. Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (recognizing that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.").

Here, Frederick's "bong hits" banner substantially interfered with a school-sanctioned activity. J.A. 43, Pet. App. 62a. The Olympic Torch Relay was an important community event:

> "The arrival of the torch in Juneau is cause for celebration," Gov. Tony Knowles said, "and I urge all Alaskans to embrace the state goal of the Olympic movement—to build a peaceful and better world by educating young people through sport, without discrimination, in the spirit of

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[11] *Cf. Tinker*, 393 U.S. at 526 (Harlan, J., dissenting) ("I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions."); *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) ("[A] reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the educational system."), *cited with approval in Tinker*, 393 U.S. at 509.

> friendship, solidarity, fair play and mutual understanding."

See Bingham, *supra*. At the culminating moment in his high school's welcoming the Olympic Torch Relay, Frederick radically changed the subject. By dividing the audience's attention—and distracting from the purpose that the Juneau School District sought to serve in sanctioning this event—Frederick's expressive conduct warranted the school's uncompromising censure. His message was trebly wrong. It was the wrong message, at the wrong time, and in the wrong place. [12]

3. Principal Morse properly disassociated the school from Frederick's pro-drug banner.

Fraser, in short, closely fits the facts at hand. But so does the third member of the Court's school speech trilogy. The Ninth Circuit deemed *Kuhlmeier* inapplicable because the school neither sponsored nor endorsed Frederick's

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[12] *Cf. Fraser*, 478 U.S. at 691 n.1 (Stevens, J., dissenting) ("Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of speech.'" (quoting *Consol. Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 544-45 (1980) (Stevens, J., concurring in judgment))). In the context of extra-curricular school activities (with students assembled before the community), administrators are frequently called upon to maintain order. In this situation, the fundamental role of educators to inculcate "habits and manners of civility" and encourage "socially appropriate behavior," *id.* at 681, seamlessly extends to guiding the demeanor of a student audience. In the interest of teaching students to be courteous spectators, an administrator should enjoy sufficiently broad authority to fulfill this duty without suffering federal judicial condemnation (and a potential money damages award to boot).

banner. Pet. App. 10a-11a.[13] This dismissive conclusion underappreciated *Kuhlmeier*'s logical reach.

Frederick's banner was unfurled in the midst of a highly important "school-sponsored" activity. Pet. App. 34a. By lending its resources to the event and sanctioning student observance during school hours, the School District unwittingly provided Frederick a bully pulpit for his publicity stunt. Frederick's "speech" was not expression in a classroom or hallway. To the contrary, he was situated outside the school with virtually the entire student body watching. At the very moment the school's involvement in the torch relay was at its zenith, Frederick lofted his 14-foot, subject-altering banner for the community (and the world) to see.

To be sure, reasonable observers might have concluded that the banner's message was so inimical to the school's mission that it did not bear the school's imprimatur. But this could be said of a student who pens a pro-drug article for a school-sponsored newspaper. *Kuhlmeier*'s framework still would apply in the latter situation, and thus censoring such an article would be entirely permissible. *See* 484 U.S. at 272 ("A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use . . . ."). If Ms. Morse had been insouciantly indifferent to Frederick's drug-related banner, many in the community might well have wondered what they are teaching at taxpayer-supported Juneau-Douglas High

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[13] For his part, Chief Judge Sedwick did not directly address *Kuhlmeier*'s applicability, though he did aver that Principal Morse rightly removed the banner "so as not to place the imprimatur of school approval on the message." Pet. App. 37a (citing *McCann*, 50 F. Supp.2d at 924 (relying on *Kuhlmeier* to uphold prohibition of school band playing or a pro-drug song)).

School. The principal, accordingly, had a powerful pedagogical concern in prohibiting such a mission-compromising expression. Similarly, under *Fraser*, Principal Morse properly determined that it was her responsibility to "disassociate" the school from the banner's pro-drug message, which undermined the school's health and safety educational mission. 478 U.S. at 685-86.

C. Frederick was subject to school disciplinary rules.

As a student attending a school activity during school hours, Frederick was indisputably under the school's authority. He was standing with the assembled student body, which, as permitted by the administration, had lined both sides of Glacier Avenue directly in front of the school. J.A. 23-24.

Under these circumstances, the School Board's policies and student handbook left no doubt that Frederick was subject to school disciplinary authority: "Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program." Pet. App. 58a (Juneau Sch. Bd. Policy 5850); *see also* J.A. 100, 103 (defining infractions as including those committed "at school sponsored/sanctioned functions or activities"). The Juneau School District's rules were consistent with common practice and established law. *See generally* 3 James A. Rapp, *Education Law* § 9.03[5][b][i] (2006) ("Authority to discipline students for school related activities extends not only to those occurring on school property but also off school property.").

Based on his findings, Chief Judge Sedwick determined "there is no issue of fact as to whether or not this was a school-sponsored activity." Pet. App. 34a. The Ninth Circuit likewise concluded, simply but decisively: This is a "student speech case," not a "speech on a public sidewalk" case. Pet.

App. 5a. Frederick's claim that he was somehow "speaking" in a Jeffersonian public square is entirely refuted by the facts as determined by the two lower courts. And in that school-related context, with its "special characteristics," Frederick was not at liberty to praise, however whimsically, the drug culture and thereby radically change the subject that had brought the student body to that time and place. The First Amendment does not reach nearly so far.

II. PRINCIPAL MORSE WAS ENTITLED TO QUALIFIED IMMUNITY IN ENFORCING A FACIALLY VALID STUDENT CONDUCT POLICY.

A. The hallmark of qualified immunity is the objective legal reasonableness of the official's act under law clearly established at the time of the act.

Under well-settled principles, qualified immunity shields government actors from personal liability and suit arising out of their official actions in all but the most exceptional cases. Only where conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known" will a court allow government officials to be sued in their individual capacities. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Under this objective test, a court may not deny immunity simply because a government actor's conduct was ultimately deemed unlawful. *Id.* Even where public officers run afoul of constitutional norms, immunity provides a vital shield from civil damages lawsuits unless "it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley*, 475 U.S. at 341. "[I]f officers of reasonable competence could disagree on" the lawfulness of the conduct, then "immunity should be recognized." *Id.*

The profoundly important, oft-recognized purpose of the immunity shield is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Harlow*, 457 U.S. at 818). In America's litigious culture, the looming threat of personal liability for discretionary acts would deeply disincentivize the full and faithful exercise of governmental authority. *Harlow*, 457 U.S. at 806. The unhappy result is that the community as a whole would pay a heavy price:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Id. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); *see Wood v. Strickland*, 420 U.S. 308, 321 (1975) (observing that qualified immunity ensures that officials do not "exercise their discretion with undue timidity"); *Scheuer v. Rhodes*, 416 U.S. 232, 241, 242 (1974) ("[P]ublic interest requires decisions and action to enforce laws for the protection of the public. . . . [I]t is better to risk some error and possible injury from such error than not to decide or act at all.").

All this is well known. In keeping with these foundational public policy considerations, qualified immunity doctrine requires that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Qualified immunity would be rendered largely meaningless if the judiciary defined the

constitutional right at issue in an overly general or abstract manner. *Saucier*, 533 U.S. at 201; *see Int'l Action Ctr. v. United States*, 365 F.3d 20, 25 (D.C. Cir. 2004) (Roberts, J.) ("It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been 'clearly established' in this country since 1791."). Much greater granularity is required. In this Court's formulation, the right in question must have been "'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The judiciary is thus called upon to examine with care the intensively fact-specific question whether in light of the circumstances confronting the governmental decisionmaker, a reasonable official could have believed his or her conduct was lawful. *Id.* at 641.

Wilson is instructive. There, this Court framed the pivotal issue as "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." 526 U.S. at 615. Although unanimously concluding that the law enforcement officers had trampled upon plaintiffs' Fourth Amendment rights, the Court nevertheless determined that the officers enjoyed immunity because the right was not clearly established at the time of the incident. *Id.* The Court reasoned that (i) it was not obvious from general Fourth Amendment principles that the officers' conduct ran afoul of constitutional norms; (ii) media ride-alongs had become a common police practice; (iii) at the time of the incident, no judicial opinions had condemned the practice as unlawful (let alone any controlling authority in the relevant jurisdiction); (iv) available persuasive authority actually suggested that the practice was lawful; and (v) the officers relied on formal ride-along policies, which bolstered the reasonableness of their belief that they were acting lawfully. *Id.* at 615-17.

So too, *Anderson* underscored the specificity required for discerning a clearly established right. In that case, an FBI agent pursuing a fugitive bank robber conducted a warrantless search of an innocent citizen's home—allegedly without probable cause or exigent circumstances. This Court held that the agent could not be stripped of qualified immunity without first examining whether a reasonable agent confronted with the same factual circumstances could have believed the search was lawful. 483 U.S. at 641. To be sure, the Court emphasized, the plaintiff-citizens manifestly had a clearly established Fourth Amendment right to be free from warrantless searches unsupported by probable cause and exigent circumstances. But that was not the end of the inquiry. To the contrary, the lower courts still had to determine whether the agent's search was objectively legally unreasonable. *Id.* Under a complete immunity-focused analysis, the transgressing agent would enjoy immunity if he or she could have reasonably but mistakenly concluded that probable cause and exigent circumstances existed. *Id.* At a minimum, this Court instructed that government officials are entitled to fair and reasonable notice that specific actions are unlawful and may give rise to liability for damages. *Id.* at 646. So long as their actions are "reasonable in light of current American law," officials should be able to exercise their authority with the fundamental assurance that their actions will not subject them to a civil damages lawsuit. *Id.*

B. Principal Morse reasonably believed that she was lawfully enforcing School Board policy against promoting illegal substances.

Principal Morse abundantly satisfies the now-familiar qualified immunity inquiry. Indeed, she represents the paradigmatic conscientious public servant for whom these bedrock qualified immunity principles were designed to protect. Responsible for maintaining order over a celebratory gathering of more than 1,000 high school

students, J.A. 56, Principal Morse was confronted with a violation of a written (and non-idiosyncratic) School Board policy. When Frederick unfurled his pro-marijuana banner, an experienced educator made a reasonable, on-the-spot judgment to enforce her School Board's longstanding, commonplace rule: "The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors." Pet. App. 53a (Juneau Sch. Bd. Policy 5520). Ms. Morse was, in short, reasonably performing her Board-mandated duties.

By no means does the fact that Frederick was neither in the classroom nor on school grounds exempt him from school discipline. As we discussed in our First Amendment analysis, at the tell-tale moment when he unfurled his banner, Frederick was a student participating in a school activity during school hours. He was not in a Jeffersonian free speech zone. The school policies, again, spelled this out with crystalline clarity: "Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program." Pet. App. 58a (Juneau Sch. Bd. Policy 5850); *see also* J.A. 100, 103 (student handbook discipline guidelines) (defining infractions as including those committed "at school sponsored/sanctioned functions or activities"). Principal Morse faithfully followed these policies to the letter.

The decisive qualified immunity question here is whether a reasonable principal could have believed that enforcing a policy against promoting illegal substances at a non-classroom school activity was lawful in light of clearly established law and the information at hand. The answer is emphatically yes. Neither the general principles developed in the *Tinker-Fraser-Kuhlmeier* trilogy, nor those elucidated in subsequent case law put Ms. Morse on notice that

enforcement of the Juneau School Board policies under these fact-specific circumstances would violate a "clearly established" constitutional right. To the contrary, such anti-drug-message policies have been commonplace in public school systems throughout the country for many years. *See* Pet. at 17-21 (summarizing the nationwide prevalence of school policies against promoting illegal substances). Rarely have these uniformly embraced policies been questioned or challenged. *Id.* In the handful of cases reviewing such policies, courts had reached a consensus that school officials possess authority to prohibit such messages, even absent a specific showing of substantial disruption. *See supra* pp. 28-29.

C. Longstanding policies against promoting illegal substances never have been deemed unlawful, even in the dissonant body of student speech law.

Principal Morse's reliance on facially valid, commonplace student conduct policies, like those at issue here,[14] was eminently reasonable. *Wilson* reinforces this dispositive conclusion. As we saw in our earlier discussion, the *Wilson* Court determined that it was reasonable for law enforcement officers to rely on formal ride-along policies, particularly where the law was "at best undeveloped." 526 U.S. 617.

Here, Juneau-Douglas' principal was abiding by—and enforcing—written policies reflecting the felt necessities of our time, namely that even whimsical espousals of illegal drug use have no part in the ever-challenging venue of public education. So it is that, in the context of student speech, the law likewise can fairly be characterized as undeveloped. For

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[14] Pet. App. 7A ("This is an 'as applied' challenged, not a 'facial' challenge.").

decades, courts and legal scholars have wrestled with the guiding principles deduced from *Tinker*, *Fraser*, and *Kuhlmeier*. Quite recently, the Second Circuit poignantly observed the difficulties posed by student speech doctrine: "This case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents." *Guiles*, 461 F.3d at 321. Not only are the voices lamenting confusion and doubt infecting the fractious body of school speech law numerous, they are robustly and ideologically diverse.[15]

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[15] *See, e.g.*, *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 & n.1 (9th Cir. 2006) (Kozinski, J., dissenting) ("Reconciling *Tinker* and *Fraser* is no easy task;" acknowledging that, at the time of the incident in *Frederick*, the parameters of "plainly offensive" speech under *Fraser* were still in flux); *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) (observing that many aspects of student speech law "are difficult to understand and apply"); *Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1273 (11th Cir. 2000) ("[T]he fact that the district court judge found the legal landscape so unclear as to include the alternative *Fraser* holding discussed above remains strong evidence that the law was not clearly established that *Tinker* prohibited the individual defendants' actions, as opposed to the more flexible reasonableness or balancing standard of *Fraser* permitting them."); *McIntire*, 804 F. Supp. at 1426 (describing *Fraser* as "oblique at best and certainly less than clear"); *see also* Cindy Lavorato & John Saunders, *Public High School Students, T-shirts, and Free Speech: Untangling the Knots*, 209 Ed. Law Rep. 1, 1 (2006) ("As a result of the numerous applications of *Fraser*, the extent of students' free speech in public schools is more than a bit tangled."); Justin T. Peterson, Comment, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 3 Mich. St. L. Rev. 931, 932-33 (2005) (examining the "confusion surrounding existing Supreme Court precedent" and asserting that "neither students nor school officials understand what students' free speech rights are in the school environment"); Douglas W. Kmiec et al., *Individual Rights and the American Constitution* 574 (2004) ("[B]alanc[ing] the students' need to exercise their First Amendment rights with the school authorities' needs to maintain order to carry out their educational tasks . . . is one of the murkier areas of the Supreme

In this hazy legal atmosphere, it was abundantly reasonable for Principal Morse to defer to longstanding policies in guiding her stewardship responsibilities. Indeed, reliance on school policies is far more compelling here than the succor sought under the ride-along policies in *Wilson*. The Court viewed the policies in *Wilson* as providing law enforcement officers comfort that they were following standard, lawful procedures, 526 U.S. at 616-17, but the policies themselves were focused more on public relations considerations than on legal justification. *Id.* at 624-25 (Stevens, J., concurring in part and dissenting in part). Here, by stark contrast, the Juneau School Board had enacted policies in full accordance with guidelines promulgated by the Alaska Administrative Code, as well as in the context of a Congressional mandate requiring the District to "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." 20 U.S.C. § 7114(d)(6); Alaska Admin. Code tit. 4, § 07.010; J.A. 22, 80-99; Pet. App. 52a-58a.

In these specific circumstances, it was reasonable *a fortiori* for Principal Morse to faithfully enforce the student conduct policies. The Ninth Circuit's hurried qualified immunity analysis ignored these policies and gave her (and the Board itself) no benefit of the doubt. In view of the state of relevant law and the existence of longstanding, facially valid policies prohibiting the promotion of illegal substances

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Court's First Amendment jurisprudence."); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 Drake L. Rev. 527, 542 (2000) ("There are literally dozens of lower federal court cases over the last thirty years dealing with student speech. They follow no consistent pattern; some are quite speech-protective and follow *Tinker*'s philosophy as well as its holding, while others are very restrictive of student speech and treat *Tinker* as if it has been overruled.").

at school activities, Ms. Morse was entirely without fair notice that her actions would give rise to personal liability. That a reasonably competent school administrator could have concluded that confronting and disciplining the banner-displaying Frederick was lawful is further underscored by the *amicus curiae* support from organizations representing tens of thousands of school administrators who, like Principal Morse, operate daily on the front lines of public education. *See* Br. of *Amici Curiae* Nat'l Sch. Bds. Ass'n et al. in Supp. of Pet. at 1.

D. The Ninth Circuit departed from fundamental qualified immunity principles.

The Ninth Circuit's determination that Principal Morse was not entitled to qualified immunity stems from the error-infected manner in which it recast and applied this Court's two-part qualified immunity test from *Saucier*. In *Saucier*, the Court rejected the Ninth Circuit's qualified immunity test because it improperly fused the question whether a constitutional violation occurred with the question whether the defendant had qualified immunity. So too here. The Ninth Circuit's qualified immunity analysis in *Frederick* once again suffers from this recurring analytical flaw.

Frederick fashions a three-part test drawn from *Saucier*:

> First, we must determine whether the facts alleged show Morse's conduct violated a constitutional right. Second, we must determine whether the right was clearly established at the time of the alleged violation. Finally, we must determine whether it would be clear to a reasonable principal that her conduct was unlawful in the situation she confronted.

Pet. App. 18a-19a (citations and internal brackets and quotation marks omitted). Although this restated test would seem to contain the essential parts of an appropriate qualified

immunity analysis, the manner in which the court of appeals explained how to execute the three steps charts a perilous course that this Court should halt.

1. The court of appeals' *post-hoc* threshold inquiry steered the analysis astray.

The Ninth Circuit began its qualified immunity analysis by restating its hindsight determination that Principal Morse violated Frederick's First Amendment rights: "The first question, whether Morse's conduct violated a constitutional right, has been addressed above in detail and answered in the affirmative." Pet. App. 19a. This determination relied, in part, on case law decided after the Olympic Torch incident, as well as a case still pending appeal at that time. *See* Pet. App. 9a n.14 (citing *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003)), 14a & n.32 (citing *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001), *cert. denied*, 536 U.S. 959 (2002)), n.33 (citing *Newsome v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003)), 15a & n.38 (citing *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003)); 15a-16a n.40 (citing *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002))). Even with full consideration of this post-incident case law, the Ninth Circuit should have answered this threshold question with a resounding no. *See supra* Part I.

2. The court of appeals confused general legal propositions for a clearly established right.

Propelled by its misstep of discerning a constitutional violation, the court of appeals next determined that Frederick's right to display a large pro-marijuana banner during school hours at a school-sanctioned event was "clearly established." Pet. App. 20a. The panel conceded that there was "no Ninth Circuit authority precisely on point" and offered only that "what we do have is consistent with the above analysis." Pet. App. 12a. Spotting precedent that may be "consistent with" a certain conclusion is manifestly not

this Court's standard for determining a "clearly established right." If no precedent is on point, then there must at least be precedent discerning "a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier*, 533 U.S. at 202-03.

That standard cannot be satisfied here. The only pre-existing, Ninth Circuit cases that the court of appeals cited in its decision were *Burch v. Barker*, 861 F2d 1149 (9th Cir. 1988), and *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992). Both cases are readily distinguishable. At all events, neither clearly establishes that Principal Morse's actions were unconstitutional. *Burch* held that an all-encompassing predistribution review policy for student publications, including for non-school-sponsored publications, was an overly broad prior restraint. 861 F.2d at 1159. This holding was expressly limited to prior restraints. *Id.* By its terms, the *Burch* rule did not "affect the ability of the school to punish students for unacceptable or disruptive conduct after it occurs." *Id.* As if more were needed, no objectionable content was involved in *Burch*. To the contrary, the school admitted that distribution of the underground newspaper at issue would have been permitted but for the pre-review noncompliance. *Id.* at 1150-51.

McMinnville, in turn, involved students who, during a teacher strike, wore various buttons festooned with the word "scab" to protest the hiring of replacement teachers. The Ninth Circuit concluded that the buttons embodied non-disruptive political speech and, therefore, that the button-displaying conduct enjoyed *Tinker*-mandated protection. 978 F.2d at 531. *McMinnville* does not remotely stand for the proposition that schools cannot prohibit messages promoting illegal substances. To the contrary, the court of appeals reaffirmed the "deferential *Fraser* standard" that "schools need not tolerate student speech that is inconsistent with the school's 'basic educational mission,'" even absent disruption

and without a showing that the speech occurred during a school-sponsored event. *Id.* at 529 (quoting *Fraser*, 478 U.S. at 685).

Turning to the law in other jurisdictions, the Ninth Circuit brushed aside the broad recognition of schools' authority to ban promotion of illegal substances. In so doing, the panel employed another backwards observation: "[T]he only times other circuit courts have held that conduct like Morse's is *not* a constitutional violation, they have done so under facts 'distinguishable in a fair way from the facts presented in the case at hand.'" Pet. App. 19a (emphasis added). This is an odd method of determining whether a public official should be afforded qualified immunity. Starting from its *post hoc*-beplagued assumption that Ms. Morse violated the Constitution, the court of appeals sought to distinguish case law that might otherwise vindicate her conduct. Whether case law supporting the constitutionality of Principal Morse's actions is "distinguishable in a fair way" may matter to the determination whether there has been a constitutional violation, but it matters little in a qualified immunity analysis.

In another doctrinal twist, the Ninth Circuit noted that Principal Morse admitted to being aware of this Court's opinions in *Tinker*, *Fraser*, and *Kuhlmeier* from an "advanced school law" course that she took almost a decade before the 2002 incident. Pet. App. 20a; *see* J.A. 76-77. That misses the analytical mark. Principal Morse's subjective beliefs do not matter in a test that pivotally turns on "objective legal reasonableness." *Wilson*, 526 U.S. at 614. That has been the law for more than two decades. Indeed, in *Harlow*, this Court eliminated subjective inquiries from the qualified immunity analysis. 457 U.S. at 818. The *Harlow* Court recognized that determinations of whether a public official subjectively acted in good faith completely

undermined a court's ability readily to dismiss frivolous and costly lawsuits against government officials. *Id.* at 815-19. The Ninth Circuit's injection of a subjective inquiry into the analysis is thus woefully misguided. This is especially true since the Ninth Circuit misconceived Principal Morse's subjective understanding. She believed in good faith that she had correctly applied relevant legal principles. Both Superintendent Bader and Chief Judge Sedwick agreed with her, as did the duly-elected School Board members. This, in short, is light years away from the dismal universe of immunity-stripping constitutional violations.

3. The court of appeals abandoned the critical inquiry whether Principal Morse's actions were objectively legally unreasonable in the particular circumstances.

The Ninth Circuit turned, finally, to what it identified as the third part of its qualified immunity test. In actual fact, this portion of the analysis is what this Court requires for determining whether a right is "clearly established"—whether the unlawfulness of the scrutinized conduct would be clear to a reasonable public official in the specific circumstances at hand. *Saucier*, 533 U.S. at 202.[16] In a pivotal move, the court below turned aside from any substantive analysis under this critical step: "Once we have held that 'the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [the official's]

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[16] The Ninth Circuit sets up this third step by purportedly quoting *Saucier*, but the attributed language appears nowhere in that decision or in any other of this Court's decisions: "The only remaining inquiry, therefore, requires that we determine whether Morse 'could . . . have reasonably but mistakenly believed that [] her conduct did not violate a clearly established constitutional right.'" Pet. App. 20a & n.59 (purportedly quoting *Saucier*, 533 U.S. at 205).

conduct.'" Pet. App. 21a (quoting *Harlow*, 457 U.S. at 818-19).

By this approach, the Ninth Circuit effectively eliminated the most important analytical step. In its proper context, the quote from *Harlow* in no way suggested that courts may avoid making a particularized finding as to what a reasonable official would conclude in the specific circumstances at hand. If any doubt remained post-*Harlow*, subsequent decisions clarified that avoiding this important analytical step constitutes error. In *Anderson*, for example, this Court reversed the Eighth Circuit for failing to consider whether a right was clearly established in the circumstances confronting the law enforcement officer: "It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally reasonable." 483 U.S. at 641.

In sum, the Ninth Circuit's qualified immunity analysis in *Frederick* revives the sin condemned in *Saucier*. The court of appeals confused general propositions for a "clearly established right" and failed to make an appropriately particularized finding as to whether a reasonable principal in Ms. Morse's position would have concluded that her disciplinary actions directed at respondent were unlawful. The upshot is that a conscientious school administrator, whose on-the-spot decisionmaking was entirely upheld by the Chief Judge of Alaska's federal district court, is now saddled with the prospect of a potentially ruinous damages award. That should not be.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit.

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IN THE

Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

—v.—

JOSEPH FREDERICK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools to punish students for displaying messages off school property, at events not sponsored by the school or supervised by the school, when a school official deems the message contrary to school policy even though there is no disruption of the educational process.

2. Whether the court of appeals properly denied qualified immunity to a public high school principal who violated clearly-established law under the First Amendment by suspending a student for constitutionally protected speech, off-campus, that Petitioners admit did not disrupt or interfere with school activities.

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STATEMENT OF THE CASE

On January 24, 2002, Joseph Frederick, an eighteen-year-old resident of Juneau, Alaska, stood among a crowd of students and adults on a public sidewalk in front of private homes and awaited the arrival of the Olympic Torch Relay. J.A. 9-10, 15-16. When the Olympic torch neared, he and several others held up a banner that read, "Bong Hits 4 Jesus," in the hopes of attracting the attention of television crews covering the event. J.A. 27-28, 67. Immediately thereafter, Juneau-Douglas High School ("JDHS") Principal Deborah Morse approached Frederick, then a high-school senior, and demanded that he and his compatriots lower the sign. J.A. 24, 29. Frederick refused to comply and protested that his First Amendment rights protected his speech while standing off campus. J.A. 24-25, 29. Principal Morse disagreed, grabbed and crumpled the banner, and later suspended Frederick from school for ten days. J.A. 25-26, 30. That disagreement along Glacier Avenue gave rise to this constitutional case.

1. Prior to the 2002 Olympic Winter Games in Salt Lake City, Utah, the United States Olympic Committee announced plans for an Olympic Torch Relay that would include Juneau along its route. J.A. 22, 27. The arrival of the Olympic torch attracted a great deal of local attention. J.A. 28-29. A television crew followed the Olympic torch through Juneau. J.A. 22, 29. Coca-Cola and local businesses sponsored the relay. J.A. 27. Teachers at JDHS were permitted to release their students from class to witness the Olympic flame travel past the high school. J.A. 23, 32, 36, 38.

Nearing his graduation, Frederick sought to use the Olympic Torch Relay to make a statement about First Amendment rights. J.A. 66-68. During his senior year, he had been increasingly bothered by the lack of attention to the issue of freedom of speech in the United States generally and

at JDHS in particular.[1] J.A. 66-68. Frederick, along with several friends, decided to put a saying that was humorous and could be controversial on a banner and to display it as the television crews covering the Olympic Torch Relay passed their position. J.A. 61-62, 66-67. He had seen the phrase they ultimately chose on a snowboard, but it was not selected to make a statement about drug use or religion.[2] J.A. 28, 65. As Frederick succinctly explained: "I wasn't trying to spread any idea. I was just trying to assert my right." J.A. 68.

On the morning of the Olympic Torch Relay, Frederick had trouble getting to school – his car got stuck in his driveway due to a recent snowstorm. J.A. 28, 34. As a result, Frederick missed his first-period class. J.A. 28, 71. After driving into town, Frederick parked his car on a public street, several blocks away from JDHS. J.A. 28. From there, he proceeded on foot along Glacier Avenue until he reached a spot across the street from several public buildings, including the municipal pool and the high school.[3] J.A. 72. Frederick did not report to school, did not enter the school building, and did not set foot on school property prior to viewing the Olympic Torch Relay. J.A. 28-29, 72-73.

By the time Frederick arrived, a crowd that included students and non-students had already assembled along both sides of Glacier Avenue. J.A. 28. Some individuals in the

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[1] Frederick was particularly disturbed by an earlier incident in which an assistant principal threatened him with suspension because he did not stand during the Pledge of Allegiance. Frederick asserted that it was his right to refuse to stand. J.A. 64.

[2] After the banner was displayed, Frederick learned that a group calling itself "Bong Hits for Jesus" performed an annual parody at Mardi Gras in New Orleans in which it imitated religious groups who protest against the revelry. Frederick explained in his affidavit that he intended the same sort of humorous, ironic expression. J.A. 28.

[3] Frederick testified that he chose this particular location, in part, because he recognized a friend and recent JDHS graduate in the crowd and stopped to speak with him. J.A. 72.

crowd were unruly. J.A. 29. Some students threw snowballs and plastic soda bottles, which had been handed out in anticipation of the arrival of the Olympic torch. J.A. 29, 32. Some students got into fights, while others left the crowd and headed downtown. J.A. 29, 32, 38. One student described the scene as "chaos." J.A. 38. Frederick and the other members of his group, however, were calm and orderly. J.A. 29. Principal Morse testified that Frederick remained respectful to her at all times. J.A. 58.

When the Olympic torch and the television cameras drew near, Frederick and his friends raised their banner so it would be viewed by the television audience. J.A. 29. At least one non-student was among those holding the banner, an adult on leave from duty in the U.S. Army. J.A. 36, 65. Principal Morse, watching the event from the school grounds, saw the banner, immediately crossed the street, and confronted Frederick and the others holding it. J.A. 24, 29. When Frederick questioned her authority by pointing out that he was not standing on school grounds, Principal Morse seized and confiscated the banner. J.A. 24-25, 29-30. Though Frederick remained respectful at all times, Principal Morse ordered Frederick to her office. J.A. 25, 30.

2. When he arrived at the principal's office, Frederick was informed that he had been suspended for five days for displaying the banner and then refusing to relinquish it. J.A. 30. According to Frederick, Principal Morse then added five days to his suspension because he protested the penalty by quoting Thomas Jefferson on free speech.[4] J.A. 30, 73-74. Principal Morse justified Frederick's punishment, in part, on her belief that the banner encouraged marijuana

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[4] There is a question whether Frederick quoted Jefferson on the sidewalk when the banner was seized or later in Principal Morse's office. J.A. 30, 41. Regardless of where it was uttered, Frederick contends that it was the reason for the doubling of his suspension. The only other student punished for holding the banner did not quote Jefferson and received only a five-day suspension. J.A. 30, 42, 73.

use and, therefore, violated school policy prohibiting any public expression that advocates the use of illegal substances. J.A. 25. By its express terms, Juneau School Board Policy 5520 applies only to conduct occurring on campus. Pet. App. 53a. Principal Morse, however, claimed that allowing students to watch the Olympic Torch Relay made the event the equivalent of a class trip.[5] J.A. 24. She further claimed that Frederick was participating in that "class trip" even though he had not yet set foot on school grounds that day. J.A. 24-25. Frederick appealed his suspension to Superintendent Gary Bader, who upheld Principal Morse's decision but reduced the suspension to eight days. Pet. App. 67a; J.A. 11, 17. The Juneau School Board affirmed Frederick's suspension "for the reasons given in the Superintendent's decision." Pet. App. 69a.

3. Frederick filed suit in the U.S. District Court for the District of Alaska pursuant to 42 U.S.C. § 1983. J.A. 8-13. In response, Petitioners admitted that the display of the banner did not disrupt any classroom work, J.A. 108, that it was not obscene or offensive to minorities, and that it did not advocate violence. J.A. 17. Principal Morse also admitted that she did not receive even a single complaint alleging that Frederick's banner promoted drug use. Deposition of D. Morse at 59-60, 77, Exhibit F to Plaintiff's Opposition to Cross-Motion for Summary Judgment. Several students submitted declarations explaining that they thought the banner was funny but had no idea what it meant, and did not understand it to be a reference to drug use. J.A. 33, 37, 38. Frederick explained that his banner was not intended to promote drug use and was not directed at students. J.A. 28, 67. According to an assistant principal, drug use at JDHS is about average, is decreasing, and there is not a drug crisis.

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[5] Juneau School Board Policy No. 5850 explains, in pertinent part: "Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program." Pet. App. 58a.

J.A. 112.

Both sides submitted motions for summary judgment. The district court ruled in favor of Petitioners. It found that Frederick had a clear expressive intent – both to be humorous and to affirm his First Amendment rights, Pet. App. 33a – but it held that the First Amendment did not prohibit school officials from disciplining Frederick because his "statements directly contravened the Board's policies relating to drug abuse prevention." Pet. App. 36a.

4. The court of appeals reversed. It ruled that Petitioners' actions were unconstitutional under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), given the absence of any evidence of actual disruption and the fact that Principal Morse "did not rip down the sign at the rally because she anticipated or was concerned about [disruptive] consequences." Pet. App. 2a. Writing for the panel, Judge Kleinfeld noted that, under the school district's theory of free speech, a student could be punished for handing out copies of an Alaska Supreme Court decision on the right to use marijuana.[6] Pet. App. 17a. The court also concluded that Principal Morse was not entitled to qualified immunity because her actions violated Frederick's constitutional rights under clearly established law that she had studied in graduate school. Pet. App. 20a.

A motion to reconsider was denied unanimously by the panel. A request for en banc rehearing was denied. This Court granted a writ of certiorari on December 1, 2006.

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[6] At the time of the banner display, the ongoing validity of the Alaska Supreme Court's ruling that there was a constitutional right to possess marijuana in the home, *Ravin v. State*, 537 P.2d 494 (Alaska 1975), was being challenged before the Alaska Court of Appeals and had been challenged through an initiative re-criminalizing personal possession (Alaska 1990 Initiative No. 2, eff. 3/3/91).

SUMMARY OF ARGUMENT

This case raises fundamental First Amendment issues about the ability of school officials to censor speech solely because that speech disagrees with the school's own, preferred message. There is no dispute that schools have an important message to deliver regarding the perils of drug abuse. But the First Amendment recognizes a critical distinction between delivering that message to students and imposing an enforced orthodoxy that tramples on free speech.

While the record in this case raises serious doubts about whether this case should be analyzed as a student speech case at all, *see* Point I.D, *infra*, Petitioners' actions were clearly unconstitutional under this Court's existing student speech jurisprudence. *See Tinker*, 393 U.S. 503; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). There is no evidence that Frederick's speech was disruptive within the meaning of *Tinker*. It was not lewd or vulgar within the meaning of *Fraser*. And it was not part of a school-sponsored expressive activity within the meaning of *Kuhlmeier*.

Petitioners' claim that Frederick was properly punished because his speech was "offensive" is irreconcilable with this Court's long-held view that speech cannot be banned as "offensive" merely because of the ideas being expressed. Likewise, Petitioners' view that Frederick's speech "undermine[d] the school's basic educational mission" is inconsistent with this Court's holding that "[students] may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

Students should, of course, be taught respect for the law. But teaching respect for the law does not entitle school officials to ban any speech that they believe could be construed, rightly or wrongly, to promote violations of the law but that falls far short of traditional incitement rules by

any measure. A discussion of civil disobedience during the civil rights era, for example, might encourage students to think about opposing other unjust laws, but it is inconceivable that school officials could therefore ban student discussions of the lunch counter sit-ins.

In this case, Frederick has consistently denied that his speech was intended to promote any illegal behavior, and Petitioners have not seriously rebutted that position except to assert that the banner he displayed "expressed a positive sentiment about marijuana use." Both in Alaska and elsewhere, marijuana laws have been and remain a subject of intense political debate.

The court of appeals correctly applied this Court's well-settled law in ruling that Frederick's suspension violated the First Amendment. And, because that law was so clearly established at the time that Frederick was punished for his speech – both by this Court's precedent and in controlling decisions from the Ninth Circuit – the court of appeals also correctly held that the school principal who ordered his punishment is not entitled to qualified immunity.

ARGUMENT

I. PETITIONERS' ACTIONS VIOLATED THE FIRST AMENDMENT PROTECTIONS THIS COURT HAS LONG AFFORDED TO STUDENT SPEECH

This case is not about drugs. This case is about speech. For nearly twenty years, the free speech rights of public school students have been defined through a trilogy of cases. Consistent with this Court's holdings in *Tinker*, *Fraser*, and *Kuhlmeier*, the court of appeals correctly held that Petitioners violated Frederick's First Amendment rights when they punished his non-disruptive speech because they objected to its perceived message.

What Petitioners describe as a disagreement with the decision below is, in reality, a disagreement with the student speech jurisprudence that this Court has developed and applied over the past four decades. By seeking a ruling that students have no First Amendment rights against school censorship unless "a decision to censor student expression has no valid educational purpose," Pet. Br. 19, Petitioners ask this Court to return to a pre-*Tinker* world. The rule they propose would open the door to an enforced orthodoxy that this Court has consistently condemned, and would effectively immunize all but irrational school censorship from constitutional scrutiny. Absent a fundamental change in the law, Petitioners' actions cannot be upheld.

Petitioners have acknowledged from the outset that the decision to suspend Frederick from school was precipitated by their belief that the banner he displayed at the Olympic Torch Relay "expressed a positive sentiment about marijuana use."[7] Pet. Br. 25. Having chosen to respond to Frederick's non-disruptive speech with disciplinary action – despite the fact that the speech occurred on a public sidewalk at a public event and before Frederick had even arrived at school for the day – Petitioners crossed the line between legitimately conveying their own message promoting a healthy, drug-free lifestyle and unlawfully suppressing what they perceived to be Frederick's contrary opinion.[8]

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[7] Although Frederick was ultimately found to have violated several disciplinary rules, J.A. 106, Petitioners have never claimed that he would have been suspended "but for" his speech, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and have defended his suspension throughout this litigation solely by reference to his speech.

[8] In fact, there is a dispute in the record about the actual message that Frederick was trying to express with his banner. Frederick has consistently maintained that the banner was intended as a humorous parody motivated by his desire to promote his own free speech rights rather than the use of drugs. J.A. 28, 67-68. Others found the message to be confusing. J.A. 37, 38.

In Petitioners' view, there can be only one approved message about drugs and disagreement with that message, or perceived disagreement with that message, is sufficient by itself to justify student discipline. This Court, however, has taken a different approach since *Tinker*. School officials undeniably have an important role in promoting civic values, including respect for the law. But that lesson is undermined when school officials themselves ignore the Constitution. As Justice Brandeis observed many years ago, the government teaches by example. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Unfortunately, the example set by school officials in this case confused order with orthodoxy in violation of the First Amendment.

A. Under This Court's Well-Established Rules, School Officials Cannot Punish Non-Disruptive Student Speech Merely Because They Disagree With The Ideas Expressed

This Court's framework for adjudicating student speech claims is long established and does not permit the censorship that occurred here. Before addressing Petitioners' suggestion to cast aside nearly forty years of student speech jurisprudence, it is important to recall why this Court has held that the First Amendment provides robust protection for student speech rights. The rule of *stare decisis* requires that entrenched legal principles not be abandoned without a compelling reason. *Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006) (explaining that "*stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process") (internal quotation marks and citation omitted). As discussed below, Petitioners have not provided any such compelling justification.

1. *Tinker* Established That Student Speech Is Entitled to First Amendment Protection and Generally Cannot Be Suppressed Absent Evidence of Disruption

In *Tinker*, this Court upheld the right of public school students to wear armbands protesting the Vietnam War. 393 U.S. at 514. At a time of profound student and political unrest throughout the country, the Court began its opinion in *Tinker* by observing that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] *Id.* at 506. The Court acknowledged "the special characteristics of the school environment" by permitting school officials to prohibit student speech if that speech "would substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509. But, the Court was equally conscious of the need to prevent that exception from swallowing the rule. Thus, the Court cautioned that, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. In addition, the Court held that student speech cannot be suppressed based on the "mere desire [of school officials] to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

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[9] The *Tinker* Court did not claim to be breaking new ground in recognizing that the Constitution applies to students. To the contrary, it described that principle as the "unmistakable holding of this Court for almost 50 years." 393 U.S. at 506 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Engel v. Vitale*, 370 U.S. 421 (1962); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

The principle that school officials may not suppress even controversial student speech in the absence of disruption was essential to the Court's holding in *Tinker*. The Court, therefore, rejected the notion that student speech could be regarded as disruptive simply because it conflicted with a message that the school was trying to present to its student audience. As the *Tinker* Court explained:

> [S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Id. at 511.

To be sure, there is a risk that student speech that deviates from the school's officially approved message may create intellectual unrest. "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). But, as *Tinker* makes clear, "our Constitution says we must take this risk," 393 U.S. at 508 (citation omitted), even in school and, perhaps, most essentially in school.

In a series of decisions spanning many decades, this Court has repeatedly noted that educational values and constitutional values are mutually reinforcing, and that the former necessarily embrace the latter in our democratic society.[10] Reviewing those holdings in *Tinker*, the Court wrote:

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[10] Both the First Amendment and public education are grounded in the common assumption that, as Justice Brandeis once explained, "freedom to think as you will and to speak as you think are means indispensable to

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.

393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal quotation marks and citation omitted). Thus, the First Amendment prohibits the state from imposing a "pall of orthodoxy" on faculty and students, whether inside or outside the classroom. *Keyishian*, 385 U.S. at 603.

The rule announced in *Tinker* is solidly grounded in bedrock First Amendment doctrine. Long before *Tinker*, this Court held that students could not be compelled to recite the Pledge of Allegiance in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Writing in the midst of World War II, Justice Jackson observed that "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men." *Id.* at 640. He then succinctly explained the constitutional objection to such "coerce[d] uniformity" in one of this Court's most frequently quoted passages: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

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the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The holding in *Tinker* reflects the same constitutional understanding.

2. *Fraser* Did Not Disturb the Central Holding of *Tinker* and Does Not Provide School Officials with a General License to Censor Student Speech Because They Disagree with its Message

In *Fraser*, this Court permitted a school to punish a student for a speech that: (i) was filled with sexual innuendo; (ii) was delivered at a school-sponsored assembly before a captive audience, and (iii) caused actual disruption. 478 U.S. at 686. The school officials in *Fraser* did not act based on disagreement with the student speaker's message, and *Fraser* did not purport to disturb this Court's condemnation of such censorship in *Tinker*. *Id.* at 685.

In short, the student speaker in *Fraser* was reprimanded not because of what he said but how and where he said it. *Id.* at 682-83. School officials did not object to the candidate he endorsed but to how he chose to express his endorsement, and the disruption it caused. *Id.* It was not Fraser's message but his language that exceeded "the boundaries of socially appropriate behavior," *id.* at 681, and justified the discipline that school officials imposed.[11]

Fraser's emphasis on the form of the expression, not its content, is apparent throughout the Court's opinion. *Id.* at 682 ("It does not follow, however, that simply because the use of an offensive *form* of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public

[11] The *Fraser* Court used at least three different phrases when summarizing the speech schools may censure: "lewd, indecent, or offensive speech," *id.* at 683, "sexually explicit, indecent, or lewd speech," *id.* at 684, and "offensively lewd and indecent speech," *id.* at 685. Given these variations in wording, it is apparent that understanding *Fraser* does not hinge on a fine parsing of the meaning of these individual words, but rather on the more general principles set out in the opinion.

school."); *id.* at 683 ("Nothing in the Constitution prohibits the states from insisting that certain *modes of expression* are inappropriate and subject to sanctions."); *id.* ("The determination of what *manner of speech* in the classroom or in school assembly is inappropriate properly rests with the school board.") (emphasis added throughout).

As further support for its decision, the Court stressed the fact that Fraser made his remarks at a school-sponsored event before a captive audience. The Court observed that: "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.* at 685. The Court underscored that concern by noting that students in the audience "hooted and yelled," and others simulated the sexual activities suggested by Fraser's language. *Id.* at 678. Subsequent to the assembly, one teacher was forced to interrupt her scheduled lesson plan to discuss the speech with her students. *Id.* Other students were "bewildered and embarrassed" by the speech and the disruptive reaction it caused. *Id.* at 678, 683-84.

By emphasizing the disruption and embarrassment caused by Fraser's speech, the Court demonstrated that Fraser's punishment might well have been justifiable under the test established in *Tinker*. By emphasizing the sexually suggestive content of Fraser's speech and its presentation at a school-sponsored event, the Court offered additional reasons for upholding the school's disciplinary action. Whether viewed as an application or extension of *Tinker*, *Fraser* did not disturb the central holding of *Tinker* and does not provide school officials with unconstrained authority to censor student speech based on disagreement with its message. To the contrary, the *Fraser* Court carefully limited its decision by explaining that "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed

in this case were unrelated to any political viewpoint."[12] 478 U.S. at 685. *See also id.* at 689 ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express.") (Blackmun, J., concurring).

3. *Kuhlmeier* Only Applies to the Regulation of School-Sponsored Speech

In *Kuhlmeier*, this Court upheld the authority of a high school principal to bar the school's newspaper from publishing articles about divorce and teenage pregnancy. 484 U.S. at 266. The Court held that where a school sponsors student speech or where student speech might reasonably be seen as bearing the "imprimatur of the school," *id.* at 271, restrictions on student speech are permissible so long as they are "reasonably related to legitimate pedagogical concerns," *id.* at 273.

The school newspaper in *Kuhlmeier* was a paradigmatic example of such speech. It was part of the curriculum, it carried the school's name on its banner, it was predominantly funded by the school district, articles were subject to pre-publication review, and the principal could fairly be regarded as its publisher. *Id.* at 262-63. Under these circumstances, the Court reasoned that the school needed greater latitude to exercise editorial control to ensure "that the views of the individual speaker are not erroneously attributed to the school," *id.* at 271, and to enable schools to

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[12] Significantly, the *Fraser* Court agreed with *Tinker* that one of "the objectives of public education [is] the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.' " 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). The *Fraser* Court further recognized that one of these "fundamental values" is "tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Id.*

dissociate themselves from student speech they might reasonably be perceived as promoting, *id.* (citing *Fraser*, 478 U.S. at 685).

Nothing in *Kuhlmeier* limited or called into question the Court's earlier reasoning in *Tinker* and *Fraser*. As the Court recognized, the issue presented by *Kuhlmeier* was "whether the First Amendment requires a school affirmatively to promote particular student speech," 484 U.S. at 270-71, and not, as in *Tinker*, whether the First Amendment requires schools to "tolerate particular student speech," *id.* at 270.

The distinction between government-sponsored speech and private speech is a familiar one in First Amendment law. *Compare Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding government's right to limit the abortion-related speech of Title X providers who are subsidized to deliver the government's prescribed message), *with Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (striking down viewpoint-based restriction on student speakers who were delivering their own message rather than that of the government).

It is not surprising, therefore, that the *Rosenberger* Court cited *Kuhlmeier* as support when it stated: "A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." 515 U.S. at 834 (citations omitted).

B. Frederick's Suspension Cannot Be Upheld Without Altering The Balance That This Court Has Struck Between Student Speech Rights And The School's Legitimate Interest In Maintaining An Environment Conducive To Learning

Hedging their bets, Petitioners argue that Frederick's suspension can be justified whether it is analyzed under *Tinker*, *Fraser*, or *Kuhlmeier*. Fairly read, however, none of

those decisions supports the sanction on speech imposed by Petitioners in this case.

1. The Record Does Not Support a Showing of the Substantial Disruption Required Under *Tinker*

As a threshold matter, Petitioners argue that *Tinker*'s required showing of disruption does not apply because Frederick's "message itself lay far outside the province of *Tinker*-protected political expression." Pet. Br. 15. This Court has never limited protection of student speech to "political speech." To the contrary, the Court has consistently recognized the value of speech irrespective of its connection to political matters of the day. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

Moreover, Frederick's expression satisfies any understanding of political speech, whether it is characterized as Principal Morse interpreted it or as Frederick intended it. Principal Morse interpreted Frederick's banner to convey a "positive sentiment about marijuana use." Pet. Br. 25. There has been and continues to be a serious debate in this country generally, and in Alaska specifically, about whether use of marijuana should be legalized. As the court of appeals observed, voters in Alaska have repeatedly considered the question whether to legalize marijuana through referenda. Pet. App. 6a n.4. So have at least six other states – Arizona, Colorado, Montana, Nevada, Oregon, and South Dakota. Additionally, Frederick has consistently denied any intention to promote drug use and, instead, has characterized the banner as an effort to assert his ability to exercise his First

Amendment rights. J.A. 28, 66-68. Speech meant to inspire a discourse on the proper scope of First Amendment protection is inherently political.

Petitioners' effort to show that Frederick's speech caused actual disruption under *Tinker* is equally flawed and unpersuasive, as the court of appeals found. At various points, Petitioners suggest that Frederick participated in the generally chaotic activities – the throwing of snowballs and plastic soda bottles by students and non-students alike – that occurred while the crowd awaited the Olympic torch and before he unfurled his banner. However, aside from Petitioners' half-hearted assertion, there is no evidence in the record that Frederick engaged in such activity, he denies it, and, in any event, it was not the basis for his school suspension. Alternatively, Petitioners suggest that Frederick's banner may have encouraged others to act out, but again that claim is unsubstantiated by anything in the record.

Petitioners also suggest that Frederick's speech was disruptive within the meaning of *Tinker* because his banner "radically changed the subject from the Olympic Torch Relay ceremony to illegality-promoting, distracting banter. . . ." Pet. Br. 15. The notion that JDHS students were quietly awaiting the Olympic Torch with undivided attention until Frederick unfurled his banner is belied by the record and Petitioners' own emphasis on the rampant horseplay that took place at the event. There is no evidence in this record that it distracted anyone except Principal Morse who objected to its message for reasons that had little or nothing to do with its potential to distract. In any event, the First Amendment does not permit school officials to treat speech more harshly than other activities that were at least equally distracting and far less expressive. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (striking down a statute that "singles out income derived from expressive activity for a burden the State places on no other income").

Lacking any evidence that Frederick's banner disrupted the actual event at which it was displayed, Petitioners next argue that its lingering effects were disruptive and interfered with the school's work. Because Petitioners have already conceded that Frederick's speech did not disrupt any classroom work, J.A. 108, their claim of actual disruption ultimately rests on some isolated graffiti that appeared at the school in the days following the Olympic Torch Relay. Assuming, *arguendo*, that the graffiti can be attributed to Frederick's speech, it is indistinguishable in any meaningful way from the handful of hostile comments to students wearing armbands that this Court found insufficient to justify the suppression of speech in *Tinker*.[13] 393 U.S. at 508. Under *Tinker*, it is not enough to show *any* interference with the work of the school. Only *substantial* interference is sufficient to justify the abridgement of First Amendment rights. *Id.* at 509. That showing was not made in *Tinker*, and it has not been made here.

Most sweepingly, Petitioners contend that Frederick's speech was disruptive simply because what Petitioners construed to be its pro-drug message was inconsistent with the anti-drug message the school was trying to inculcate. *Tinker*, however, expressly rejects the broad definition of disruption that Petitioners now propose. As then-Judge Alito explained in striking down a school's anti-harassment policy on overbreadth grounds: "Although [the school district] correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under [its] Policy." *Saxe v.*

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[13] Principal Morse conceded that the isolated graffiti might well have been a response to her actions rather than Frederick's banner. Deposition of D. Morse at 76, Exhibit F to Plaintiff's Opposition to Cross-Motion for Summary Judgment. Several students recalled that Principal Morse's actions, not the message on Frederick's banner, prompted discussion among their classmates. J.A. 33, 37, 38.

State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d. Cir. 2001).

The Court in *Tinker* conceived of public school education as a marketplace of ideas.[14] 393 U.S. at 512. By allowing school officials to regulate disruptive behavior, *Tinker* assured the orderly working of that marketplace. *Tinker* does not equate disruptive behavior with disruptive ideas, as previously noted, nor does it permit school officials to characterize a speaker as disruptive merely because the speaker's ideas disagree (or are perceived to disagree) with the school's own preferred views. Thus, it would not have changed the outcome in *Tinker* had the Des Moines School Board enacted a policy supporting the Vietnam War, instead of simply prohibiting symbolic armbands.[15]

The reference in *Tinker* to a "material interference with school activities," *id.* at 514, must be understood in context. *Tinker* is a landmark First Amendment case. The rule it announced was intended to limit the discretion of

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[14] Quoting *Keyishian*, *Tinker* referred to the classroom as "peculiarly the 'marketplace of ideas.' " 393 U.S. at 512 (quoting *Keyishian*, 385 U.S. at 603). Given the public forum doctrine, it would be paradoxical to assert that students have fewer free speech rights while attending a public rally on the public streets than in the classroom. *See Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (public streets are a quintessential public forum). Petitioners, wisely, do not make that claim.

[15] This precise example was discussed in *Tinker* itself, when the Court said:

> If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

393 U.S. at 513 (citations omitted).

school officials to suppress student speech, not expand it. *Tinker* appropriately recognized that school officials have a duty to maintain an environment in which teachers can teach and students can learn. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (school board can be held liable when it knows of student-on-student sexual harassment and fails to address it). The armbands in *Tinker* did not cause a "material interference" with that environment and Petitioners cannot credibly claim that Frederick's banner did either.

2. Frederick's Speech Was Not "Offensive" Within the Meaning of *Fraser*

Petitioners also argue that Frederick's speech was punishable under *Fraser*. They contend that the school needed to sanction Frederick in order to preserve decorum because "[h]is message was trebly wrong. It was the wrong message, at the wrong time, and in the wrong place." Pet. Br. 32.

Petitioners' argument might have more force if their decision to sanction Frederick for his banner could reasonably be described as a time, place, or manner regulation. It cannot. Frederick was suspended because school officials believed that his banner expressed a pro-drug message. Petitioners have never given any indication throughout this litigation that they would have found his purported message any less objectionable had it been delivered at any other time or in any other place or in any other manner.[16] That assessment must be made within the

[16] Put in different but related First Amendment terms, it is impossible to describe the school's interest in this case as "unrelated to the suppression" of Frederick's expression. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Moreover, Petitioners' actions were not reasonable even if they could somehow be characterized as a time, place, or manner regulation. Any asserted interest in decorum is undermined by the boisterous setting in which Frederick's speech occurred. There was no disruption of any teaching because no teaching was taking place. These circumstances make Petitioners' censorship very different than a prohibition on

school context itself to have any analytic coherence. Otherwise, a total ban on student speech could always be re-characterized as a time, place, or manner regulation. Presumably, the school administrators in *Tinker* would not have objected if the student plaintiffs in that case had worn their black armbands at home or on the weekend. If *Fraser* permits school officials to achieve that result simply by invoking the school's general interest in decorum, then *Fraser* has effectively overruled *Tinker*. This Court certainly did not say so in *Fraser* and it has not said so since.

In similar fashion, Petitioners place far too much weight on the statement in *Fraser* that schools need not tolerate "lewd, indecent, or offensive speech" by student speakers. 478 U.S. at 683. Emphasizing this Court's use of the disjunctive, Petitioners argue that Frederick's speech could properly be characterized as "offensive" even if it was neither "lewd" nor "indecent." The terms "lewd" and "indecent," however, are often used as synonyms when referring to sexual speech, and the term "offensive" is frequently applied to both. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Thus, despite the use of the disjunctive, it is entirely plausible that the reference to "lewd, indecent, or offensive speech" was simply meant to describe the sort of sexual innuendo at issue in *Fraser*. Given the Court's sensitivity to insulating minors from sexually explicit speech, *see FCC v. Pacifica Found.*, 438 U.S. 726 (1978), it is also plausible that *Fraser*'s reference to "offensive speech" was an allusion to what *Tinker* described as speech "colliding with the rights of others," 393 U.S. at 513.

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discussing literature in math class, for example. And, there was little or no risk that a reasonable observer would attribute Frederick's speech to the school for all the same reasons that *Kuhlmeier* does not apply. *See* Point I.B.3, *infra*.

What is not plausible is that the *Fraser* Court meant to grant school officials broad discretion to label speech as "offensive" based on disagreement with the content of the speech rather than the manner of its expression. Like all other government officials, school administrators must exercise their discretion "within the limits of the Bill of Rights." *Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637). And, as this Court has repeatedly held, "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection . . . ." *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (quoting *Pacifica Found.*, 438 U.S. at 745). *See also Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression.") (citation omitted).

It is not surprising, therefore, that this Court's subsequent citations to *Fraser* have not mentioned the possibility that schools can punish students for "offensive" speech that is not vulgar, obscene, or sexual in content. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 325 (2000) (Rehnquist, C.J., dissenting); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 239 n.4 (2000) (Souter, J., concurring in judgment); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 775 n.2 (1996) (Souter, J., concurring); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995); *Lee v. Weisman*, 505 U.S. 577, 597 (1992); *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 240-41 (1990); *Kuhlmeier*, 484 U.S. at 266-67, 271-72; *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

Unable to rely on authority from this Court, Petitioners cite *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000), as support for their view that

Frederick's speech was "offensive" within the meaning of *Fraser* and could therefore be censored without a showing of disruption under *Tinker*. *Boroff*, however, has not been followed by other courts. Like the Ninth Circuit in this case, the Second Circuit rejected its reasoning in *Guiles v. Marineau*, 461 F.3d 320, 329 (2006), *cert. pending*, Dkt. No. 06-757 (filed Nov. 28, 2006), and the Sixth Circuit itself subsequently concluded that *Fraser* does not apply when it is "the content of speech, not the manner" that triggers school censorship. *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 542 (6th Cir. 2001).[17]

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[17] The other lower court cases that Petitioners have cited also fail to support the sweeping authority they claim in this case. Three involve the fundamentally different context of school-sponsored speech. *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999). Indeed, only *McCann* involved speech about drugs. Two are post-*Boroff* district court opinions within the Sixth Circuit that reference, but do not apply, *Boroff*'s language permitting the censorship of pro-drug speech under *Fraser*. *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 970-71 (S.D. Ohio 2005); *Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847, 853 (E.D. Mich. 2003). *Gano v. Sch. Dist. No. 411 of Twin Falls County, State of Idaho*, 674 F. Supp. 796 (D. Idaho 1987), does not support Petitioners' position because it concerned the ability of schools to proscribe defamatory speech. *Id.* at 798. *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980), predates both *Fraser* and *Kuhlmeier*. Its holding that a school could forbid the distribution of an underground student newspaper that contained a drug-related advertisement was based in part on its conclusion that the speech at issue was commercial in nature and in part on its conclusion that the speech had no literary value because it was not a serious discussion of drugs and drug use. *Id.* at 1206. In *McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415 (W.D. Okla. 1992), the court held that that there was a material issue of disputed fact regarding whether a student's t-shirt violated the school's dress code. *Id.* at 1419. It then concluded that *Kuhlmeier* and *Fraser* were inapplicable, analyzed the case under *Tinker*, and held that the school failed to meet the *Tinker* disruption standard. *Id.* at 1426. It declined to reach the school's argument that *Fraser* permitted the school to punish students for

Petitioners are equally mistaken when they point to the *Fraser* Court's reference to speech that "undermine[s] the school's basic educational mission," 478 U.S. at 685, as justification for the school's actions in this case. A school's "educational mission" cannot be so broadly defined that it prohibits any speech that is at odds with the school's official message or instructional goals. This Court did not go nearly so far in *Fraser*. Read in context, *Fraser*'s reference to speech that "undermine[s] the school's basic educational mission" cannot be divorced from the immediately preceding reference to Fraser's "vulgar and lewd speech," or the immediately following reference to the fact that the speech took place in "[a] high school assembly . . . directed towards an unsuspecting audience of teenage students." *Id.*

Earlier in the same paragraph, moreover, the Court reiterated that "the penalties imposed in [*Fraser*] were unrelated to any political viewpoint." *Id.* On this point, therefore, *Tinker* and *Fraser* are easily reconciled. Speech that "substantially interfere[s] with the work of the school," *Tinker*, 393 U.S. at 509, can be prohibited because it "undermine[s] the school's basic educational mission," *Fraser*, 478 U.S. at 685. Absent evidence of actual disruption or vulgar language, speech that expresses a controversial message neither "undermine[s] the school's basic educational mission," nor "substantially interfere[s] with the work of the school."

Petitioners suggest that this Court "respectfully defer[] to school administrators' judgments in cabining expression that is inconsistent with the educational function of public schools." Pet. Br. 15. *Fraser* does not, however, mandate the sweeping deference to school officials that Petitioners read into it. Whatever discretion Petitioners are entitled to when *Fraser* or *Kuhlmeier* apply, Petitioners are not entitled to redefine the scope of those decisions or grant

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messages inconsistent with its anti-alcohol educational mission. *Id.* at 1427.

themselves greater power to sanction student speech than this Court has determined the First Amendment permits. Petitioners' discretion is necessarily limited by the First Amendment as this Court has defined it.

In short, *Fraser* is a case about lewd speech that caused actual disruption in a school-sponsored assembly containing a captive audience of adolescent students. None of those factors is present here. Frederick's speech was not lewd or sexually suggestive. It did not cause actual disruption, and it did not take place in a school-sponsored speech forum. In light of these differences, the court of appeals understandably concluded that *Fraser* was not controlling on these facts and evaluated the constitutionality of Frederick's suspension under *Tinker* instead.[18]

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[18] Petitioners' suggestion that the decision below threatens to undermine school dress codes around the country is a red herring. Courts have routinely applied *Tinker* when student dress codes have been used to censor student speech because of its actual or perceived message. *See, e.g., Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 666-67 (S.D. Tex. 1997) (holding that school policy barring students from wearing the rosary, due to its identification as gang-related apparel, could not be enforced against a devout Catholic student absent evidence of actual disruption or a substantial reason to anticipate disruption). *Accord Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 259-60 (4th Cir. 2003); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 254-58 (3d Cir. 2002); *Castorina*, 246 F.3d at 541-44; *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365-66 (10th Cir. 2000). Those decisions are entirely consistent with the approach followed by the court of appeals here. Likewise, nothing in the decision below is inconsistent with those courts that have relied on *Fraser* to analyze student dress codes that have targeted sexually suggestive speech. *See, e.g., Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 168-70 (D. Mass. 1994) (applying *Fraser* to uphold portion of dress code banning sexually suggestive apparel); *Broussard v. Sch. Bd. of the City of Norfolk*, 801 F. Supp. 1526, 1535-37 (E.D. Va. 1992) (applying *Fraser* to uphold suspension of student for wearing t-shirt stating "Drugs Suck," where school concluded that "suck" was sexually suggestive). As in *Tinker*, however, it is unnecessary for the Court to consider the issue of student dress codes in order to resolve the discrete student speech issue presented by these facts. 393 U.S. at 507-08.

3. Frederick's Speech Was Not School-Sponsored Within the Meaning of *Kuhlmeier*

Finally, Petitioners argue that Frederick's speech should be considered "school-sponsored" under *Kuhlmeier* because the school district "unwittingly provided Frederick a bully pulpit for his publicity stunt" by "lending its resources to the event and sanctioning student observance [of the event] during school hours." Pet. Br. 33. The flaw in Petitioners' analysis is that *Kuhlmeier* applies only when the school sponsors the expressive activity itself. The fact that student speech occurs at or near school during the school day does not, without more, make it school-sponsored speech. And the fact that the school allowed some students to observe the event did not, without more, convert the Olympic Torch Relay into a school-sponsored expressive activity.

According to Petitioners, had Principal Morse decided not to remove the banner, the message would have acquired "the school's imprimatur" causing "many in the community" to wonder "what they are teaching at taxpayer-supported Juneau-Douglas High School." Pet. Br. 33-34. The syllogism that any student speech that is not disavowed by the school will be attributed to the school is entirely circular and, if followed by this Court, and would strip *Kuhlmeier*'s distinction between school-sponsored and private student speech of any meaning.[19] Accordingly, this Court has

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[19] The lower courts have correctly understood and consistently applied this limitation on *Kuhlmeier*. *See, e.g.*, *Guiles*, 461 F.3d at 327 (concluding *Kuhlmeier* was not applicable to review of suspension based on student's t-shirt parody of President George W. Bush, because *Kuhlmeier* "comes into play only when the student speech is 'school-sponsored' or when a reasonable observer would believe it to be so sponsored"); *Child Evangelism Fellowship v. Stafford Township Sch. Dist.*, 386 F.3d 514, 524-25 (3d Cir. 2004) (declining to apply *Kuhlmeier* to analyze school's refusal to permit distribution of religious group's materials, where materials were "obviously not official [school] documents"); *Newsom*, 354 F.3d at 257 ("no reasonable observer could conclude that [the school] somehow endorsed the [NRA] t-shirt worn by Newsom . . ."); *Castorina*, 246 F.3d at 543 (concluding that *Kuhlmeier*

repeatedly rejected the argument that students or others can or will reasonably believe that schools endorse "everything they fail to censor." *Mergens*, 496 U.S. at 250 ("secondary students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis"). *See also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (rejecting concern that elementary school students would perceive religious club's use of school building as endorsement of religion); *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring) ("Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical").[20]

The link between Frederick's speech and the school is especially attenuated in this case. The banner was unfurled on a public sidewalk at a public event where students intermingled with members of the general community. At least one non-student joined Frederick in holding up the banner, which was not on school grounds. Frederick had not been in school that day and never entered the school building until after the incident that gave rise to this lawsuit. Unless

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was not applicable because "the students' actions were not school sponsored, the school did not supply any of the resources involved in the wearing of the [Confederate flag] t-shirts, and no reasonable observer could conclude that the school had somehow endorsed the students' display").

[20] There is a circuit split on whether *Kuhlmeier* permits viewpoint discrimination when the school is the speaker, but *Kuhlmeier* has no application where it is the student that is speaking, not the school. *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 631-32 (2d Cir. 2005) (explaining that "[w]hether [*Kuhlmeier*] represents a departure from the long-held requirement of viewpoint neutrality in any and all government restriction of private speech is an issue that has been the subject of much debate among Circuit Courts, which have reached conflicting conclusions") (internal citation omitted).

someone knew Frederick personally, there was nothing that connected Frederick and his banner to the school. In fact, he was an eighteen-year-old senior at the time, but he could just as easily have been a recent graduate.

Under all of these circumstances, it is highly unlikely that any reasonable observer would have concluded that Frederick was speaking on behalf of the school or with its approval. Indeed, that is not even Petitioners' claim. Their primary concern was that school officials would be criticized for a lack of discipline if they did not respond to Frederick's banner. Frederick was not suspended because he was carrying the school's message but because he was contradicting it in the view of school officials.

C. There Is No Need To Create A New *Per Se* Rule Defining A Previously Unrecognized Category Of Unprotected Student Speech

Since *Tinker,* this Court's approach to student speech has been balanced and contextual. Petitioners cannot prevail under that approach. Accordingly, they propose a blanket rule that would prohibit any student speech that advocates illegal conduct or, alternatively, any student speech that promotes drug or alcohol use, or that is contrary to what the school defines as its "mission."

Faced with a similar request to bend First Amendment rules in favor of a popular cause in *Barnette*, Justice Jackson wrote: "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." 319 U.S. at 641. "Nevertheless," he went on, "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." *Id.* In this case, the rallying cry is drugs rather than patriotism. But the insistence that our commitment to free speech must be sacrificed to serve some larger value is equally false and should be similarly rejected.

To some, Frederick's speech will undoubtedly seem adolescent and trivial. Petitioners saw it as evidence of Frederick's disrespect for the law. The cure they propose, however, is worse than the disease. Under our constitutional system, respect for the law cannot be compelled through censorship.

A *per se* rule prohibiting students from engaging in speech that "promotes" unlawful conduct undermines the values it is designed to protect. In constitutional terms, it lacks the fit between means and ends that the First Amendment requires, as a bare minimum, even from content-neutral laws. *See, e.g., Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989). In addition, it is fatally overbroad and would allow schools to prohibit a great deal of speech that is currently protected by the First Amendment. In the 1960's, for example, it would have allowed school officials to punish speech urging support for the civil rights sit-ins. Such speech is not inherently disruptive and does not undermine the school's basic educational mission – unless that mission is inappropriately defined as preservation of the status quo under all circumstances.

In a slightly more focused version of the same argument, Petitioners contend that school officials should, at the least, be allowed to prohibit any speech promoting illegal drug use. Attempting to draw an analogy to this Court's student drug testing cases,[21] Petitioners contend that deterring student drug use is an important and federally-mandated element of the school's educational mission, that peer pressure can be a powerful inducement to student drug use, that schools do not have to wait until a drug epidemic erupts to take preventive action, and that prohibiting any student speech deemed to contain a pro-drug message is as constitutionally unobjectionable as drug testing students who voluntarily participate in extracurricular activities. Pet. Br. 26-30. At every step of the analysis, however, the analogy

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[21] *See Earls*, 536 U.S. 822; *Acton*, 515 U.S. 646.

breaks down. The student drug testing cases involve conduct, not speech. They were analyzed under the reasonableness standard of the Fourth Amendment rather than the more stringent standards of the First Amendment relevant here. They were also subject to significant limitations that are not present in this case. Only students who volunteered to participate in extracurricular activities were subject to drug testing and, in the Court's view, those students had relinquished their full privacy rights. *Earls*, 536 U.S. at 831. In addition, students who failed the challenged drug tests were not subject to any disciplinary action other than exclusion from extracurricular activity. *Id.* at 833. By contrast, nothing about Frederick's status distinguished him from any other student and he received a ten-day suspension for his allegedly pro-drug message. Most fundamentally, perhaps, there is a substantial constitutional gulf between a drug testing program premised on the assumption that undetected drug use in school will lead to further drug use, and an official school policy to penalize speech because it allegedly encourages behavior that the school is trying to discourage. *See Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.").

The dangers of Petitioners' approach are evident in the Solicitor General's brief, which argues that even speech advocating reform of the drug laws can properly be subject to school discipline. U.S. Br. 27. As the court of appeals pointed out, that would mean that a student in Alaska could be disciplined for distributing copies of the Alaska Supreme Court decision recognizing a state constitutional right to possess small amounts of marijuana. Pet. App. 16a-17a n.44. Similarly, it would mean that students in school could not argue in favor of a ballot initiative to legalize medical marijuana in their state and could, perhaps, even be barred

from discussing cases now pending in this Court that challenge the crack/cocaine disparity in federal sentencing.[22]

Petitioners have fallen woefully short of justifying such a severe intrusion into First Amendment rights and such a radical departure from this Court's current jurisprudence. In an attempt to fill that vacuum, Petitioners devote several emotionally fraught pages to propounding an argument that no party to this case has ever disputed: schools have a role to play in preventing drug abuse by minors.

Schools may devote classroom time to counseling against the use of illegal drugs and, indeed, Juneau schools offer a health education program that teaches students about alcohol and drug abuse prevention. J.A. 80. Schools may plaster their hallways with posters conveying the same messages. Schools also have a variety of non-speech means to combat drug use. They may notify parents when students appear to be under the influence of drugs. They may notify law enforcement when students are found selling drugs in school. They may ban and punish drug use and possession in school. And they may suspend or expel drug-addicted students.

The existing policies of the Juneau School Board already provide for all of these options. J.A. 84-94. What school officials may not do is punish students who question by word, not deed, the wisdom and efficacy of those school policies or the prevailing social attitude toward the use of drugs. Here, as elsewhere, the solution lies in "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

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[22] Moreover, carving out a content-based subset of this sort raises additional First Amendment problems under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

D. The Record Supports A Finding That This Is Not A Student Speech Case Because Frederick Was Not Subject To The School's Authority When He Was Told To Take Down His Banner

To justify the regulation of student speech under *Tinker*, school officials must show that the speech "materially and substantially disrupt[ed] the work and discipline of the school." 393 U.S. at 513. The *Tinker* standard represents an effort to accommodate the free speech rights of students and the "special characteristics" of the school. As a consequence of that accommodation, *Tinker* provides less protection than traditional First Amendment rules applicable outside the school environment. For that reason, however, school officials seeking to invoke *Tinker* (or any other student speech case) must establish as a threshold matter that there is, in fact, some nexus between the speech and the school.

In the typical case, that nexus is not disputed because the speech occurs inside the school, during the school day, and as part of a faculty-controlled, school-sponsored event. At the opposite end of the spectrum, the lower courts have generally held that school officials may not punish student speech that occurs outside the school, unless the speech causes substantial disruption inside the school. *See, e.g.*, *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (semester-long suspension for contributions to student website violated First Amendment due to lack of evidence of disruption within school); *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (school could not punish students for contents of "morally offensive, indecent, and obscene" off-campus publication because activity within school was *de minimis*); *Klein v. Smith*, 635 F. Supp. 1440, 1441-42 (D. Me. 1986) (enjoining suspension of student who made insulting gesture toward teacher after school hours and off school grounds).

Because Petitioners cannot satisfy even the less stringent *Tinker* standard applicable to student speech cases,

it is unnecessary for this Court to resolve whether Frederick was actually subject to school discipline when he was told to take down his banner. If Frederick's suspension violated his free speech rights as a student then, *a fortiori*, it violated his free speech rights if he was speaking as a citizen entitled to the full protections of the First Amendment.

There is, nonetheless, ample basis in this record to conclude that this is not a student speech case at all.[23] As previously noted, Frederick had never even arrived at school when he unfurled his banner. He intentionally positioned himself across from the school so that he was not standing on school property. J.A. 28. The Olympic Torch Relay was a public event on a public street that was jointly sponsored by Coca-Cola and local businesses. J.A. 27-28. Students who were attending class on the morning of the Olympic Torch Relay were released from class so that they could see the Olympic torch. J.A. 23. Frederick, however, was not among those students released from class because he went directly from home to the parade. J.A. 28-29. Even those students who had been in class were, at best, only loosely supervised on the streets. J.A. 36. Except for members of the school pep band, cheerleaders, and one gym class, students were not required to remain together and some students apparently took advantage of the occasion to leave for the day. J.A. 23, 36.

Petitioners claim that Frederick was subject to their disciplinary authority rests on several assertions, none of which is persuasive. First, Petitioners argue that Frederick was supposed to be in school before the Olympic Torch Relay and the fact that he was late should not exempt him from school discipline. The difficulty with that argument is

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[23] Although both courts below analyzed this as a student speech case, Pet. App. 5a-6a, 34a-35a, their determinations are subject to *de novo* review by this Court whether they are characterized as conclusions of law, findings of fact, or some combination of the two. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

that this case is about Frederick's speech, not his tardiness. Had he unfurled the banner in the window of his home, he might still have been guilty of an unexcused absence but he would not otherwise have been subject to school disciplinary proceedings, nor should he be here.

Second, Petitioners contend that the Olympic Torch Relay was analogous to a field trip and students on a field trip are subject to school discipline as a matter of logic and Juneau School Board policy. Pet. Br. 34. The contention is flawed in both its major and minor premises. Petitioners have not demonstrated how the act of releasing students from class to watch a public event on a public street extends the school's jurisdiction over a person who was not released from a class, had not even been on school grounds, and was in a public area for his own, non-school purpose. The question of whether a release of students to watch the Olympic Torch Relay was like a field trip is separate and distinct from the question of whether Frederick was part of any class's field trip. Third, Petitioners suggest, without citing any evidence, that Frederick's speech was aimed at students. Frederick testified that he directed his speech at the news cameras and supports that claim by noting that he did not unfurl his banner until the Olympic torch was approaching and the cameras were turned on. At a minimum, adults were clearly part of the audience and this Court has never upheld a restriction on speech occurring in public because it was accessible to children. *See, e.g., Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 561-562 (2001); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 213 (1975).

Applying traditional First Amendment principles to Frederick's speech as an adult attending a public event on the public streets, there is no doubt that the judgment below must be affirmed. Just as the government cannot prohibit speech that is critical of a foreign government within 500 feet of that government's embassy, *Boos v. Barry*, 485 U.S. 312 (1988), it cannot prohibit speech on a public street near a public

school simply because it disagrees with the message the school is trying to convey on the same subject.

II. PRINCIPAL MORSE IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR SUPPRESSING FREDERICK'S SPEECH MERELY BECAUSE SHE DISAGREED WITH THE OPINION HE EXPRESSED

Officials whose conduct violates "clearly established" constitutional rights are not shielded from liability by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Instead, qualified immunity shelters officials who make reasonable mistakes. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In order to determine whether an official is entitled to the defense, this Court has prescribed a two-part inquiry. *Hope v. Pelzer*, 536 U.S. 730, 736, 739 (2002). First, a court must determine "whether plaintiff's allegations, if true, establish a constitutional violation." *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Second, a court must decide whether the violated right was "clearly established" at the time of the relevant action. *Saucier*, 533 U.S. at 201; *see also Will v. Hallock*, 126 S. Ct. 952, 959 (2006) (explaining that officials are entitled to qualified immunity if "the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was").

If a right is "clearly established," then a reasonable officer can perceive a clear difference between lawful and unlawful conduct in the particular circumstances. *Saucier*, 533 U.S. at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). Such clarity does not require a pre-existing court decision specifically on point. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)). Instead, general principles from prior decisions are sufficient to make a right "clearly established" so long as they provide "fair and clear warning" that the officials' actions were unconstitutional. *Hope*, 536 U.S. at

741; *see also United States v. Lanier*, 520 U.S. 259, 271 (1997) ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful'") (quoting *Anderson*, 483 U.S. at 640). The determination of whether a right was clearly established hinges on "the level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639. The question is whether a reasonable official would know that "his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (citation and internal quotations omitted). If "the contours of the right [are] sufficiently clear," qualified immunity is not an available defense. *Anderson*, 483 U.S. at 640.

Principal Morse is not entitled to qualified immunity because she violated Frederick's clearly established constitutional rights. First, none of the justifications for restricting student speech discussed by this Court in *Tinker*, *Fraser*, or *Kuhlmeier* applies to these facts, and even Petitioners do not claim that their actions can be justified under the First Amendment if Frederick was not subject to school supervision when he unfurled his banner. Second, Frederick's rights were clearly established at the time of the incident.

Under this Court's jurisprudence, the appropriate inquiry is whether a reasonable official could have believed that the First Amendment permitted the suppression of speech that was not disruptive, not school-sponsored, and not sexually suggestive, merely because of disagreement with the opinion expressed. The answer is plainly no. Binding Supreme Court and Ninth Circuit precedent clearly established at the time of the incident that such speech, particularly when uttered in the non-curricular setting, could not be suppressed absent evidence of disruption or impingement of the rights of others. Petitioners have not

demonstrated either. Instead, they have maintained that Frederick's banner was suppressed because its message was inimical to the school's anti-drug policies. Based on this asserted justification, Principal Morse's conduct ran afoul of clearly established First Amendment principles.

A. Controlling Law Clearly Established That Principal Morse Violated Frederick's First Amendment Rights When She Punished Him For His Speech

In analyzing whether a right is "manifestly apparent," courts search "the decisions of the Supreme Court, [the relevant] court of appeals, and the highest court of the state in which the case arose."[24] *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) (internal alterations and quotation marks omitted)). *See also Hope*, 536 U.S. at 741-42 (reviewing Supreme Court precedent, Eleventh Circuit cases, and Alabama Department of Corrections regulations). If there are no such decisions from courts of "controlling authority," the court of review looks to determine whether there is "a consensus of cases of persuasive authority" from other jurisdictions. *Wilson*, 526 U.S. at 617.

Here, there is controlling and binding authority from both this Court and the relevant court of appeals. Simply stated, school officials cannot suppress speech merely because of disagreement with the viewpoint expressed. *Tinker*, 393 U.S. at 514. That is, however, precisely what occurred in this case. Neither *Fraser* nor *Kuhlmeier* undercuts this core tenet of *Tinker* and neither is applicable on these facts.

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[24] In *Breese v. Smith*, 501 P.2d 159 (Alaska 1972), the Alaska Supreme Court struck down hair-length restrictions for students. *Breese* is the only Alaska Supreme Court decision that is arguably pertinent to the qualified immunity analysis.

The Ninth Circuit's decisions in *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988), and *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992), further establish general principles that "apply with obvious clarity to the specific conduct in question." *Lanier*, 520 U.S. at 271. In *Burch*, the Ninth Circuit struck down as overbroad a school policy that required administrative approval of all student writings prior to their distribution on campus. 861 F.2d at 1159. The court explained that "control over the educational curriculum requires control by administrators over the content of what is taught" but that "no similar content control is justified for communication among students which is not part of the educational program." *Id.* at 1157. The Ninth Circuit also made clear that "[i]nterstudent communication does not interfere with what the school teaches; it enriches the school environment for the students." *Id.* at 1159.

Four years later, in *Chandler*, the Ninth Circuit established a clear framework for the categorical analysis of student speech: "the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Kuhlmeier*, and all other speech by *Tinker*." 978 F.2d at 529 (internal citations omitted). The *Chandler* Court concluded that buttons emblazoned with the word "scab" were not plainly offensive within the meaning of *Fraser* even though "the word is most often used as an insult or epithet." *Id.* at 530 (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974)).[25] Derogatory and disrespectful statements about replacement teachers

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[25] The *Chandler* court's formulation of Supreme Court student speech precedent has been repeatedly followed. *See Guiles*, 461 F.3d 320; *Saxe*, 240 F.3d 200; *Pyle*, 861 F. Supp. 157. *See also Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 739-40 (N.D. Ind. 2005) (noting that eight of the circuits agree that "*Tinker* provides the default rule for suppression of student speech, and *Fraser* and [*Kuhlmeier*] create narrow exceptions to that rule").

stand in opposition to the school's mission. Yet, in 1992, the Ninth Circuit clearly rejected the application of *Fraser* to circumstances similar to those in which Principal Morse found herself.

Further clarification on the scope of *Fraser* was provided in *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001). In that case, the Ninth Circuit upheld a high school principal's decision to expel a student based in part on a graphically violent poem that described an attack on a classroom of students. *Id.* at 990. The *LaVine* Court concluded that, due to the poem itself and evidence of previous disruption, the school's actions were justified under *Tinker*. *Id.* at 989-90. Expulsion was not permissible under *Fraser* because the student's poem was not vulgar, lewd, obscene, or plainly offensive speech. *Id.* at 989. *See also Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673 (9th Cir. 1971) (reversing lower court's dismissal of student's First Amendment claim where student was suspended for distributing leaflets critical of school's dress code while standing across the street from school); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (explaining that *Fraser* was based on "prior findings that there is a government interest in protecting children from sexually explicit materials, and that obscene speech is entirely unprotected by the First Amendment").[26]

Given this extensive and consistent precedent, the law provided Principal Morse with clear notice that her conduct "was unlawful in the situation [she] confronted." *Saucier*, 533 U.S. at 202. In fact, the Ninth Circuit specifically explained the "opacity in this particular corner of the law has

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[26] Petitioners also rely on *Gano*, 674 F. Supp. 796, to provide support within the Ninth Circuit for their position that Frederick's right was not clearly established. As explained in n.17, *supra*, *Gano* pertains to a school's authority to regulate defamatory speech.

been all but banished . . . ."[27] Pet. App. 20a. For Principal Morse's conduct to have been reasonable, Frederick's speech had to substantially interfere with the work of the school, be lewd, vulgar, or plainly offensive in form or manner, or be sponsored by the school. Because none of those conditions was met, Principal Morse's conduct violated clearly established and controlling law.[28]

B. The Existence Of A School Board Policy That Prohibits Students From Advocating The Use Of Illegal Drugs Does Not Immunize Principal Morse From Personal Liability

Petitioners rely on this Court's opinion in *Wilson* as support for their argument that the existence of a Juneau School Board policy prohibiting student expression that

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[27] Amicus United States argues that the Ninth Circuit's reliance on "the unique facts of this case" constitute "precisely the types of subtle distinctions, unresolved in existing precedents, upon which school administrators' personal liability ought not turn." U.S. Br. 30. This position turns the Ninth Circuit's rationale on its head. While acknowledging that different facts might have led to a different outcome, the court of appeals properly analyzed *this* case on *these* facts and concluded that Principal Morse had violated clearly established law.

[28] Petitioners assert that Frederick's First Amendment right was not clearly established based, in part, on the fact that the Ninth Circuit cited case law decided after January 2002. Pet. Br. 44. Petitioners' argument is unavailing. *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003), simply supports the Ninth Circuit's assertion that the legalization of marijuana is an oft-debated topic in Alaska. Pet. App. 6a. *Newsom*, 354 F.3d 249 (images of weapons on clothing), *Scott v. School Board of Alachua County*, 324 F.3d 1246 (11th Cir. 2003) (Confederate flag), and *Sypniewski*, 307 F.3d 243 (Jeff Foxworthy redneck t-shirt), each apply *Tinker* and examine the record for evidence of disruption. These cases represent a reiteration of the clearly established rule. Finally, Petitioners' objection to the Ninth Circuit reference of *LaVine* is that both the request for rehearing en banc and the petition for certiorari were denied subsequent to this incident. Neither of those facts, however, undermines the fact that the Ninth Circuit's decision in *LaVine* was good law in January 2002.

advocates the use of illegal drugs immunizes Principal Morse from personal liability. Pet. Br. 38-40. In *Wilson*, this Court concluded that police officers were entitled to qualified immunity because it was not unreasonable for them to have believed that bringing media observers along during the execution of an arrest warrant was lawful at the time of the incident. 526 U.S. at 615. Reliance on the policy was reasonable because "the state of the law as to third parties accompanying police on home entries was at best undeveloped." *Id.* at 617.

Here, by contrast, Principal Morse applied Juneau School Board Policy 5520 to a developed and settled area of the law that plainly barred the action she took. The contours of the right specifically at issue had been clearly established at time of the Olympic Torch Relay. Suppression of student speech merely because of disagreement with the opinion expressed has been clearly unlawful since 1969. And there is nothing distinct or novel about Frederick's speech that made reliance on the Juneau School Board Policy 5520 reasonable in light of clearly established case law.[29] Moreover, by her own admission, she was well aware of that law at the time she acted and, indeed, had studied it in a graduate-level course.[30] J.A. 76-77.

Petitioners also argue that reliance on this specific policy is more compelling than the police officers' reliance in

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[29] Juneau School Board Policy 5520 prohibits "any . . . expression that . . . advocates the use of substances that are illegal to minors . . . ." Pet. App. 53a. By contrast, the policies referenced by Petitioners in their brief in support of their Petition for Certiorari pertain to restrictions on apparel only. The sheer breadth of the Juneau School Board policy makes Principal Morse's reliance even more objectively unreasonable.

[30] Principal Morse testified that her graduate course in school law covered "*Tinker*, *Hazelwood*, *Fraser*, *Bethel*, all of the pertinent case law related to student rights or school." J.A. 77.

Wilson (where the policy was more focused on public relations), because the Juneau School Board policy had been enacted in accordance with the Alaska Administrative Code and in the context of a Congressional mandate. Pet. Br. 42. These provisions, however, do not require the Juneau School Board to suppress student expression that arguably promotes the use of marijuana. For example, Petitioners repeatedly cite 20 U.S.C. § 7114(d)(6), which demands that schools "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." *Id.* Speech uttered by students, whatever its position, does not preclude schools from developing and communicating their own consistent message.

C. Petitioners' Reliance On Non-Binding Case Law And Dicta Suggesting Ambiguity In The Jurisprudence Fails To Undermine The Conclusion That Frederick's Rights In These Circumstances Were Clearly Established

Petitioners seek to undermine the conclusion that Principal Morse's actions violated clearly established and binding law by citing cases from other jurisdictions in an effort to develop a "consensus" of persuasive authority that supports the curtailment of student speech promoting the use of illegal drugs. Pet. Br. 29-30. Petitioners also rely on dicta and sweeping generalizations made in the legal scholarship in an effort to paint a picture of a confused and unsettled jurisprudence. Pet. Br. 40-42. While the contours of certain areas of student speech rights are not precisely defined, this is a straightforward case. Moreover, the cases relied upon by Petitioners neither create a compelling consensus nor rebut clearly established binding precedent.

Petitioners' reference to the alleged ambiguity of student speech jurisprudence is unpersuasive, given the particular right at issue in this case. Courts have repeatedly emphasized that neither *Fraser* nor *Kuhlmeier* undercut the guiding principle in *Tinker* that schools cannot censor student

speech merely because they disagree with the student's message. *See, e.g.*, *Castorina*, 246 F.3d at 540 (explaining that *Tinker*'s holding is "consistent with a number of later Supreme Court decisions signaling that viewpoint-specific speech restrictions are an egregious violation of the First Amendment"); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) ("*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.").

Additionally, courts analyzing the second prong of qualified immunity look to other jurisdictions only when there are no relevant decisions with binding authority. *Wilson*, 526 U.S. at 617. Because binding Supreme Court and Ninth Circuit case law provides the guiding principles in this case, there is no need to look beyond it.[31]

In sum, the Ninth Circuit followed this Court's prescribed analysis in concluding that Principal Morse violated Frederick's clearly established First Amendment rights. The court of appeals reviewed binding Supreme Court and Ninth Circuit precedent and distilled from this case law the contours of the right at issue. Moreover, Petitioners' reliance on Juneau School Board Policy 5520 and their efforts to create a consensus of persuasive authority fall short. In the end, Petitioners cannot hide from the fact that Principal Morse seized Frederick's banner and punished him because she disagreed with the position he advocated. That action contravenes the First Amendment, and Principal Morse should be held accountable.

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[31] Petitioners' efforts to demonstrate legal uncertainty outside the Ninth Circuit is thus legally irrelevant for these purposes and unpersuasive. *See* nn.17 & 18, *supra*. While there may not have been total uniformity, there was certainly a consensus in the lower courts that *Tinker* established the governing standard absent evidence that the censored speech was school-sponsored, lewd and vulgar, or commercial in nature.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent and his *amici* do not quarrel with the proposition that advocating illegal drug use by minors is out of place in our nation's public schools. To the contrary, they accept the schools' fundamental interest in discouraging the use of illegal substances. Resp. Br. at 6 ("There is no dispute that schools have an important message to deliver regarding the perils of drug abuse."); *see, e.g.*, ACLJ *Amicus* Br. at 10-11 ("The physical and emotional vulnerability of youth . . . can justify more intrusive measures to detect and halt drug abuse.").[1]

Nevertheless, respondent and his *amici* suggest that petitioners have imposed a "pall of orthodoxy" over the Juneau-Douglas High School by prohibiting messages that promote illegal drug use. Resp. Br. at 12. They are mistaken. The same Juneau School Board policy that prohibits advocacy of illegal drug use explicitly recognizes that "[s]tudents will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions." Pet. App. 53a. Likewise, the School Board embraces students' rights to "explore fully and fairly all sides of . . . controversial issues." Juneau Sch. Bd. Policy 1240, *available at* http://www.jsd.k12.ak.us/

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[1] *See also* Drug Policy Alliance *Amicus* Br. at 29 (acknowledging "the inestimable seriousness of the problem of youth drug abuse"); Liberty Legal Inst. *Amicus* Br. at 14 ("The use of drugs is a criminal offense, and whatever disagreement there may be about the efficacy of the drug laws, or about the need for laws against adult use of the less dangerous illegal drugs, there is overwhelming consensus in the polity that adults should discourage children from using drugs."); Nat'l Coal. Against Censorship *Amicus* Br. at 7 ("Amici curiae share Petitioners' and the Government's commitment to promoting the health and well-being of our nation's youth by discouraging illegal drug use . . . .")' Rutherford Inst. *Amicus* Br. at 27 (noting "the dangers and perils of drug use"); Students for Sensible Drug Policy *Amicus* Br. at 9 ("Students often experience disproportionate pain in seeing family members, friends, and classmates suffer from drug abuse.").

newdistrict/departments/boardofeducation/policymanual/_displayPolicy.php?recid=13.[2]

Under no reasonable interpretation of this record were petitioners suppressing discourse over drug policy or any other political, religious, or ideological issue—in or out of the classroom. Nor are Juneau's student conduct rules challenged as overbroad or vague. *Cf. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.).[3] This case is also far removed from freedom-of-conscience concerns, *cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), or attempts to restrict access to books or educational materials. *Cf. Bd. of Educ. v. Pico*, 457 U.S. 853 (1982). Rather, this case involves the enforcement of a valid student conduct rule that seeks to protect minors from illegal drug use—one of the most pressing social problems plaguing our nation's schools. *See* Pet. Br. at 26-30.

Even some of respondent's civil liberties champions accept the proposition that schools have authority to suppress pro-drug messages. The Liberty Legal Institute recognizes that "the age of the students and the educational context may justify restrictions on *advocacy of prohibited conduct* in public schools." Liberty Legal Inst. *Amicus* Br. at 15. "Education of children, and protecting children from self-destructive behavior," they reason, "is at the core of the mission entrusted to schools." *Id.* Exactly so. The Rutherford Institute similarly acknowledges that "the school arguably has a compelling interest in insuring a drug-free

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[2] The Board also mandates that students and parents be involved in the "collaborative process" of reviewing and revising school policies, regulations, and procedures that govern "student behavior and safety." J.A. 98.

[3] Respondent does not suggest that he was denied fair notice or due process. *Cf. Goss v. Lopez*, 419 U.S. 565 (1975).

environment within the school and in proscribing pro-drug messages on campus or where students formally represent the school system in academics, athletics, or extracurricular activities or on other school properties." Rutherford Inst. *Amicus* Br. at 24-25. We agree.[4]

Respondent seeks to avoid the precise issue of the case—schools' authority to proscribe pro-drug messages. *See* Resp. Br. at 7 ("This case is not about drugs."). He and his *amici* argue (unremarkably) that school officials should not have "unbridled discretion" to regulate religious and political speech. We agree. Vital constitutional assurances prevent such unfettered exercise of authority. We thus have no quarrel with *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), and the free-speech principles it embodies.

Agreement ends, however, when respondent and his *amici* choose to underread this Court's decisions in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). The "special characteristics" of the public school setting call for judicial deference to the enforcement of reasonable school rules as school officials carry out their "basic educational mission." *Kuhlmeier*, 484 U.S. at 267; *Fraser*, 478 U.S. at 685. Respondent thus seeks to recast this case as about adult speech in a public forum. This Court should reject that re-characterization, just as the courts below did. Analyzed properly, the facts establish—and the law demonstrates—that petitioners did not violate respondent's First Amendment rights and that Juneau-Douglas High

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[4] In contrast to Rutherford's suggested special limitations, this "compelling interest" extends to students attending school-sponsored events held off campus.

School's principal, Deborah Morse, is entitled to qualified immunity.

I. THIS IS A STUDENT SPEECH CASE.

Both the district court and the court of appeals—as well as the superintendent and the school board—agreed that the dispute at hand arose in the factual setting of a school event. *See* Pet. App. 5a ("[T]he facts established by the submissions on summary judgment make this a student speech case."); Pet. App. 34a-35a ("[T]here is no issue of fact as to whether or not this was a school-sponsored activity. . . . Frederick's presence at the event put him under the school's authority.").[5]

Respondent (and some of his *amici*) nonetheless insist that the factual record supports a finding that this is a "speech on a public sidewalk" case rather than a "student speech" case. Resp. Br. at 33-36; Drug Policy Alliance *Amicus* Br. at 4, 18-21; Nat'l Coalition Against Censorship *Amicus* Br. at 7-18; Rutherford Inst. *Amicus* Br. at 10-27; Student Press Law Ctr. et al. *Amicus* Br. at 6-15.[6] They are wrong. Respondent and these *amici* ignore a wealth of undisputed facts:

- The banner incident "occurred during school hours, at a time when parents expected their children to be under school supervision." Pet. App. 35a; *see* Pet.

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[5] *See also* Pet. App. 69a ("[T]he Board of Education affirm[s] the suspension of [Joseph Frederick] for the reasons given in the Superintendent's decision."); Pet. App. 63a ("I believe it unreasonable to find that Joseph can stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school. His rights are those of a student at school.").

[6] Respondent's other *amici* analyze this case solely as a student speech case.

App. 5a-6a ("School had started . . . . Frederick was a student, and school was in session.").

- Principal Morse authorized teachers to allow their classes to observe the relay as it passed in front of the school. J.A. 23; Pet. App. 24a-25a, 34a.
- The student body, consisting of more than 1,000 students, congregated on both sides of the street in front of the school. J.A. 56; Pet. App. 24a-25a.
- Respondent stood directly across the street from school with a group of his classmates and one similarly-aged non-student.[7] J.A. 29, 35, 36; Pet. App. 2a, 25a, 70a.
- The high school pep band and cheerleaders were organized to greet the relay participants as they passed the school. Pet. App. 4a, 34a; J.A. 23.
- District personnel, teachers, and administrators were interspersed throughout the student body and were assigned supervisory roles. J.A. 23, 47-56; Pet. App. 34a; *cf.* Pet. App. 4a-5a, 17a.
- The School District spent funds on the event. In addition to school authorities assisting in the event's preparations and remaining on supervisory duty during the relay, the District also made supervised release time and transportation available for students

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[7] Respondent refers to the one identified non-student, Eli Geil, as "an adult on leave from duty in the U.S. Army." Resp. Br. at 3. This factually insignificant (and legally irrelevant) foray need not give this Court pause. In any event, respondent is mistaken. Even his record citation (J.A. 65) indicates that this person enlisted some months *after* the events in question. According to school district directory information, at the time of the banner incident, the would-be adult non-student was actually sixteen years old and had been a 9th-grader at Juneau-Douglas High School during the prior school year.

from schools not along the relay route so that they could participate in the event. J.A. 23; Pet. App. 63a.

- School rules provided that "[p]upils who participate in approved social events and class trips are subject to district rules for student conduct." Pet. App. 58a. The student handbook likewise explained that the discipline guidelines applied to infractions committed "at school sponsored/sanctioned functions." J.A. 100, 103.

These facts firmly establish that respondent was a student subject to school authority at the time he unfurled his banner. As such, his First Amendment rights must be "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Respondent created no genuine issue of fact in this respect. Pet. App. 6a, 34a. Having failed to convince the superintendent, the school board, the district court, and the court of appeals that he was not under the school's aegis, he trots out again several previously-rejected points: (i) he was eighteen years old; (ii) he was not standing on school property; (iii) he had not been present at school prior to showing up to the location where he unfurled his banner; (iv) the relay was a public event; and (v) the event was (allegedly) unsupervised. Resp. Br. 34-35. We briefly respond to each.

Respondent provides no authority supporting the theory that an eighteen-year-old high school student is entitled to ignore school disciplinary rules (including those governing expressive conduct).[8] Nor does he muster support for the proposition that school rules are inapplicable to high school students participating in school activities located off

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[8] To the contrary, the Court has observed that "older students," through "their conduct and deportment in and out of class," set an important example for younger students. *Fraser*, 478 U.S. at 683.

campus.[9] Absent such authority, Juneau's student conduct policies unequivocally state that the rules apply during off-campus school events, Pet. App. 58a, and nowhere do the rules provide for an age-based exemption.

Respondent's tardy arrival at school is likewise unavailing. He could have selected myriad locations along the ten-mile relay route to carry out his publicity stunt. He instead chose to position himself front-and-center before the assembled student body, where his banner would be visible to his fellow students. School authorities were responsible for the safety and good conduct of students in attendance, including respondent. J.A. 24, 96; Pet. App. 53a, 58a. By joining in with his fellow students and participating in the school's viewing of the relay, respondent voluntarily submitted to the school's authority.

In addition, the school's assembled viewing of the relay (whether labeled "school sponsored," "school sanctioned," or "school authorized") was no less of a school event by virtue of the fact that the relay itself was a community-wide event (with public and private sponsors). Students on field trips unquestionably remain entrusted to school authorities' care

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[9] Some of respondent's *amici* cite cases where students' off-campus expressive activities were found to be immune from school punishment. None of the examples involve student expression taking place during an off-campus school event—let alone at an event where the students gathered together on and adjacent to campus. *Compare, e.g., Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1048 (2d Cir. 1979) (invalidating student suspensions for distributing underground newspaper that was published and distributed off campus and not during any school event), *with McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999) (upholding school's prohibition against student band playing song "White Rabbit" at off-campus school event). In addition, as a matter of hornbook education law, student disciplinary authority extends to off-campus school-related activities. 3 James A. Rapp, *Education Law* § 9.03[5][b][i] (2006).

and supervision. This jurisdictional responsibility remains regardless of who sponsors the exhibit (or event).

Finally, respondent asserts (in his restated "Questions Presented") that the event was "not . . . supervised by the school." Resp. Br. at i. Not so. Respondent's only evidence consists of affidavits from three students, two of whom stated they were co-participants in the banner incident. J.A. 32-33, 36-38. These three students variously stated that (i) they were "released" to see the relay; (ii) they were not required to stay with their classes; (iii) some students were running around, throwing snowballs, or otherwise acting up; and (iv) some students slipped away or did not attend the event. *Id.*

None of the three students claim that they had been released *from school.* Rather, they state that teachers permitted students to leave their classrooms for the purpose of watching the relay as it passed in front of the school. J.A. 32 ("[M]y teacher released us to go see the relay . . . ."); J.A. 36 ("[T]he school allowed students to go out to the street to watch [the relay]."); J.A. 38 ("[T]he teacher announced that we could go watch [the relay]."). *Cf.* J.A. 23 ("Students were not 'released' from school . . . ."); J.A. 47, 49, 51, 53 (same).

True, most teachers did not require students to stay with their particular classes, but students were required to remain with the student body. J.A. 47, 49, 51, 53. So too, some in the crowd became unruly—namely, students in Frederick's vicinity—and others may have managed to sneak away. J.A. 56. But respondent proffers no authority for the odd (and unworkable) proposition that schools relinquish supervisory authority if some students break the rules.[10]

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[10] Indeed, if a student had been injured during the school's torch relay viewing, the school could have faced potential liability for negligent supervision. *See generally* Allan E. Korpela, Annotation, *Tort liability of*

In any event, official supervision did exist. Principal Morse declared (without contradiction) that "teachers, administrators and other staff were interspersed throughout the body of students at appropriate intervals for maintenance of crowd control." J.A. 56. In addition, the student affiants' teachers confirmed (again, without contradiction) that they "assist[ed] in providing crowd control with the student body in general." J.A. 47-54. This is confirmed by respondent himself, who acknowledges that he and his friends "could see some school officials trying to stop [other students from throwing things]." J.A. 29. Nor is there any dispute that Principal Morse, who responded immediately to respondent's banner display, supervised the event:

> I was stationed directly in front of the high school supervising crowd control. I was assisted by other administrators, classroom teachers and school staff. I passed back and forth across the street on numerous occasions, as required, in order to maintain proper supervision of the student body.

J.A. 23 Indeed, it is uncontroverted that Principal Morse approached Frederick and his friends at least twice—once to investigate the throwing of snowballs launched from their vicinity and then again when Frederick unfurled his banner. J.A. 24. The pivotal point remains—official school supervision existed at the event.

The material facts are clearly established. Frederick has shown no error in the concurrent findings by the two courts below. *Cf. Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). As the Ninth Circuit succinctly

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public schools and institutions of higher learning for injuries resulting from lack or insufficiency of supervision, 38 A.L.R.3d 830 (1971 & Supp. 2007).

observed in the opening sentence of its opinion: "This is a First Amendment student speech case." Pet. App. 1a. The *Tinker-Fraser-Kuhlmeier* framework therefore governs.

II. PETITIONERS DID NOT VIOLATE THE FIRST AMENDMENT BY DISCIPLINING RESPONDENT FOR PROMOTING ILLEGAL SUBSTANCES AT A SCHOOL EVENT.

A. In the context of constitutional assurances against unfettered discretion, public school authorities may restrict student speech that undermines the "basic educational mission."

Respondent and his *amici* vigorously attack a central unifying principle from this Court's First Amendment student speech jurisprudence: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission, even though the government could not censor similar speech outside the school.'" *Kuhlmeier*, 484 U.S. at 266 (citing *Fraser*, 478 U.S. at 685). This, they fear, is too broad. To cabin its reach, respondent suggests that this principle has no application beyond the specific facts of the Court's *Tinker-Fraser-Kuhlmeier* trilogy. Resp. Br. at 25. Some of his *amici* dismiss the principle as a "novel"—even "dangerous"—standard. *See, e.g.*, Nat'l Coal. Against Censorship et al. *Amicus* Br. at 19; Lambda Legal Def. & Educ. Fund *Amicus* Br. at 13-14. Their stated concern is that public schools would have "unbridled discretion" to randomly define and oppressively enforce whatever "missions" they choose for themselves. *See, e.g.*, Liberty Counsel *Amicus* Br. at 6.

What respondent and his *amici* ignore is that school board officials who develop student conduct rules, and administrators who enforce such rules, are constrained by the overarching requirement of "reasonableness" in the context of constitutional limitations on state power. The Free Speech Clause, observed the *Tinker* Court, permits "reasonable

regulation of speech-connected activities in carefully restricted circumstances." 393 U.S. at 513; *cf. id.* at 517 (Black, J., dissenting) (identifying "reasonableness" as the majority's standard for judicial review of school disciplinary regulations).[11] In the *Tinker* Court's view, the school district's ban on armbands, which was based *solely* on "an urgent wish to avoid the controversy which might result from the expression," was an unreasonable regulation. 393 U.S. at 510. The *Tinker* ban could have passed constitutional muster, however, if school officials had shown "interference, actual or nascent, with the schools' work." *Id.* at 508. The *Fraser* standard for regulating "offensive" speech is likewise properly understood as one of "reasonableness."[12] Justice Brennan, in concurring, opined that it was "not unreasonable" for school officials to condemn Matthew Fraser's language. 478 U.S. at 689 & n.2 (Brennan, J., concurring).[13] Similarly, in *Kuhlmeier*, the Court employed a "reasonable basis" standard in reviewing a school district's

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[11] *Tinker* relied on lower court decisions applying a reasonableness standard in reviewing student speech regulations. *Id.* at 505 & n.1, 509, 511, 513 (citing *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)). *See also Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 810 (2d Cir. 1971) ("*Tinker* as well as other federal cases, e.g., *Blackwell* . . . and . . . *Burnside* . . . , establish that, if students choose to litigate, school authorities must demonstrate a reasonable basis for interference with student speech, and that courts will not rest content with officials' bare allegation that such a basis existed.").

[12] *See Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267 (11th Cir. 2000) (describing "reasonableness or balancing standard of *Fraser*"); *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996) (applying "reasonableness" standard under *Fraser*).

[13] In Justice Brennan's view, the student's speech was mild by adult standards, but he nevertheless deferred to the "discretion" of school officials who concluded that the speech "disrupted the school's educational mission." *Id.* at 687-89 (Brennan, J., concurring).

censoring of student newspaper articles. The Court upheld the school officials' actions as "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273.

In sum, the analyses applied in the *Tinker-Fraser-Kuhlmeier* trilogy reflect a balancing of interests. A student's interest in freedom of expression is necessarily weighed against the school's interest in maintaining order, inculcating socially appropriate norms, and achieving educational goals. This balancing or reasonableness standard extends to public schools' definitions of their basic educational mission.

Respondent and his *amici* further contend that a school's educational mission could be defined so broadly that non-disruptive, non-offensive, and non-school-sponsored religious and political viewpoints could be suppressed. Untrue. Important constitutional safeguards protect against this. In the case of religious or anti-religious expression, student free speech rights are further informed by the Establishment Clause, the Free Exercise Clause, and the equality principle unifying our system of free expression. Under this well-developed constitutional framework, a school's educational mission cannot be to inculcate religious beliefs or to favor one religion over others. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). So too, schools cannot seek to avoid controversy by banning religious speech or imposing secular humanistic worldviews. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001).

Student political expression likewise enjoys protection, most notably for reasons elucidated in *Tinker*, which stands for the proposition that schools may not suppress student political expression merely to avoid controversy. 393 U.S. at 513. Likewise, a school's educational mission cannot be the suppression of ideas motivated by "narrowly partisan or political" concerns. *Pico*, 457 U.S. at 870. Indeed, in the various opinions of *Pico*, no member of the otherwise

sharply divided Court took issue with this basic proposition. *Id.* (plurality opinion); *id.* at 877-78 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 907 (Rehnquist, J., dissenting).

Other *Tinker*-related safeguards exist to prevent schools from devolving into pockets of oppression. Student speech regulations are facially challengeable on overbreadth and vagueness grounds. *Saxe*, 240 F.3d at 214. Students are entitled to fair notice of the scope of speech restrictions and may challenge punishment on due process grounds. *Goss*, 419 U.S. at 574-75. Here, respondent advanced no such facial challenge to Juneau School Board policies, nor did he assert any procedural due process violation. In short, allowing schools to fashion and enforce reasonable policies to protect their basic educational mission is fully compatible with our constitutional order.

B. Student speech that promotes illegal drug use is not protected in the public high school environment.

Respondent equates his pro-marijuana banner with John Tinker's passive armband wearing. Resp. Br. at 21. To state the obvious, the two messages are vastly different. Promotion of illegal drug use and the drug culture is uniquely undeserving of First Amendment protection in the school setting. Pro-drug messages targeted at adolescents foster a social harm distinctly damaging and disruptive.[14] "Students

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[14] Judicial acknowledgement that pro-drug messages inherently disrupt the work of the schools is illustrated by *Williams v. Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980)—an opinion that neither respondent nor his *amici* criticize. At least one of respondent's *amici* embraces *Williams* as a proper example of student discipline because the pro-drug message involved a "direct, unambiguous endorsement of illegal activity" that had no literary value or similar value, such as a serious discussion of drugs. Students for Sensible Drug Policy *Amicus* Br. at 21; *accord* Resp. Br. at

are more likely to use substances when the norms in school reflect a greater tolerance for substance use." Revathy Kumar et al., *Effects of School-Level Norms on Student Substance Abuse*, 3 Prevention Sci. 105, 121 (June 2002). *See* D.A.R.E. Am. et al. *Amicus* Br. at 11-12.[15] Allowing students to dilute a school's anti-drug message—which is an integral part of the district's health curriculum—undermines the basic educational mission.

Fraser likewise supports suppressing respondent's banner. Respondent and his *amici* try to limit *Fraser* to sexual speech. But *Fraser* allows regulation of categories of speech much broader than sexual innuendo—in particular, speech that offends the "sensibilities of others" (including fellow students) or that does not reflect "socially appropriate behavior." 478 U.S. at 681. Respondent ignores the rationale behind the *Fraser* Court's more expansive allowance of speech restrictions in public high schools—that

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24 n.17. Notably, the "unambiguous" pro-drug message in *Williams* was a store's advertisement for *bongs*. *See* 622 F.2d at 1203 ("The advertisement primarily promoted the sale of a waterpipe used to smoke marijuana and hashish."). If prohibiting a small print ad for bongs is acceptable, it follows logically that a 14-foot "bong hits" banner can be suppressed.

[15] The drug policy reform organizations supporting respondent take issue with the effectiveness of certain campaigns to discourage teenage drug use. *See* Drug Policy Alliance et al. *Amicus* Br. at 17; Students for Sensible Drug Policy *Amicus* Br. at 20. This Court need not resolve a policy debate on the efficacy of drug-use prevention programs here. That is a burden belonging to local school officials. If school officials reasonably determine that proscribing pro-drug messages will advance their interest in discouraging teenage drug use, federal courts should not meddle with such a determination.

certain types of expression are not suitable for adolescents. *Id.* at 683-85.[16]

Respondent further seeks to narrow *Fraser*'s reach to student expression that is "disruptive" and "school sponsored." Resp. Br. at 13-15, 26. Not even the Ninth Circuit goes so far. *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (clarifying that *Fraser* applies even absent disruption and school sponsorship). Indeed, this Court explicitly rejected any notion that *Fraser* required disruption. *Kuhlmeier*, 484 U.S. at 271 n.4. And *Fraser* itself did not turn on any school-sponsored aspect of Matthew Fraser's speech.[17]

Respondent and his *amici* accuse petitioners of viewpoint discrimination[18] as if this tenet of First Amendment applied fully to the public school setting. In any event, this Court's student-speech doctrine does not forbid it in all circumstances. *Tinker*, for instance, would allow curtailment of viewpoint-based speech if the expression was reasonably likely to interfere with the work of the schools. 393 U.S. at 508, 513; *see, e.g.*, *Williams*, 622 F.2d at 1205-06. Similarly,

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[16] By analogy, film industry ratings reflect commonly-accepted age-appropriate content categories, namely, sex, violence, language, and drugs. *See* Motion Picture Ass'n of Am., *What do the ratings mean?*, *available at* http://mpaa.org/FlmRat_Ratings.asp ("There is no drug use content in a PG-rated film. . . . Any drug use content will initially require at least a PG-13 rating. . . . An R-rated film may include . . . drug abuse, . . . so parents are counseled in advance to take this advisory rating very seriously. . . . The reasons for the application of an NC-17 rating can be . . . drug abuse . . . which, when present, most parents would consider too strong and therefore off-limits for viewing by their children.").

[17] If Fraser's sexually-laced speech to a *voluntary* school assembly constituted "school-sponsored" speech, then the facts here are equally compelling that Frederick's sign reasonably bore the school's imprimatur.

[18] The assertion is ironic in view of Frederick persisting, "I wasn't trying to spread any idea." J.A. 68.

assuming that a ban against promoting drugs can constitute viewpoint discrimination, then the Court endorsed such an approach in *Kuhlmeier*, in the context of school-sponsored student expression. 484 U.S. at 272. Under respondent's theory, so long as classroom work is not disrupted, students are free to use their school day to promote (to a captive audience of their schoolmates) whatever antisocial activity they fancy. *Contra Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000) (upholding prohibition of certain rock band t-shirts due to band's overt ties to suicide, violence, and drug abuse), *cert. denied*, 532 U.S. 920 (2001). In respondent's view, school authorities should be powerless to remove such counterproductive messages from the school environment.

Fundamentally, respondent and his *amici* fail to discern the "special characteristics" of the school environment. *Tinker*, 393 U.S. at 506. They seek to thrust into the public school milieu the full robust conception of adult free speech rights. *See, e.g.*, Resp. Br. at 30 (arguing that public high school students have a right to promote criminal activity in school); Drug Policy Alliance *Amicus* Br. at 6 n.1 (asserting that advocacy of unlawful conduct is protected here under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1967)). Case law involving adult speech in a public forum is only useful to the extent that principles are recast to take into consideration the custodial and tutelary nature of the school setting and the *in loco parentis* responsibilities of school authorities. Viewed through the "special characteristics" lens, banning students from promoting illegal drug use is entirely reasonable.

C. School officials must have authority to reasonably interpret student expression in its context.

Respondent and some of his *amici* seem to advocate comprehensive, non-deferential judicial review of school officials' decisions to restrict student expression. Resp. Br. at 25-26; Liberty Legal Inst. *Amicus* Br. at 3-4. This is

unworkable. "Public schools have an interest of constitutional dignity in being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries." *See Brandt v. Bd. of Educ.*, Nos. 06-1999, 06-2573, 2007 WL 641516, at *5 (7th Cir. Feb. 20, 2007) (Posner, J.).

First Amendment analysis is inevitably contextual. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Teachers and administrators responsible for enforcing student speech policies are called upon to interpret messages in a variety of circumstances. These officials are the pivotal (and front-line) message interpreters. A school official's interpretation of a student's expression should not be disturbed by a court unless the interpretation, in its context, is manifestly unreasonable. *See Pyle By & Through Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 170 (D. Mass. 1994) ("[U]nless federal courts are to take on the task of assessing, each morning of the school year, the latest creations of the adolescent imagination . . . [,] the limits on vulgarity in secondary schools, assuming a general standard of reasonableness, are to be defined by school administrators, answerable to school boards and ultimately to the voters of a community.").

Principal Morse reasonably understood respondent's banner as glorifying illegal marijuana use. Respondent offers no credible alternative meaning.[19] He was not punished for

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[19] Respondent suggests that his banner was a protest of "an earlier incident in which an assistant principal threatened him with suspension because he did not stand during the Pledge of Allegiance." Resp. Br. at 2 n.1. No school records or witnesses corroborate this allegation, and petitioners refute it. In any event, there is no evidence that anyone viewed or understood respondent's banner as a protest. Frederick's testimony mentioning the purported Pledge incident was nowhere included in the district court record. Respondent thus advised the court of appeals that "this reference is properly disregarded." Partial Opp'n to

expressing political or religious views. Pet. App. 62a. He was suspended because he violated school board policy against promoting illegal drugs and because he committed several other infractions before and after the banner incident. Pet. App. 59a-67a.

Principal Morse's interpretation of the banner has withstood two administrative appeals and review by the district court and court of appeals. Pet. App. 6a-7a, 38a, 61a-62a, 69a. This Court should not disturb that finding, and should not engage in anything more than a judicial check of reasonableness.

III. PRINCIPAL MORSE IS ENTITLED TO QUALIFIED IMMUNITY.

If reasonably competent school officials could disagree on the lawfulness of Principal Morse's enforcement of school board policy, then she is still entitled to qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Principal Morse readily satisfies this test. The reasonably competent school officials who deemed her actions lawful include Superintendent Bader and the unanimous Juneau School Board. *See also* Nat'l Sch. Bds. Ass'n et al. *Amicus* Br.; U.S. *Amicus* Br. (joined by Dep't of Educ.). If that were not enough, Chief Judge John Sedwick also agreed that she did not violate a "clearly established" right. Tellingly, none of the eighteen *amicus* organizations supporting respondent assert that Principal Morse should have been denied qualified immunity.[20] The Ninth Circuit's immunity ruling, which

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Appellees' Mot. to Strike Portions of Appellant's Excerpts of R. We agree.

[20] Respondent's only *amicus* to address qualified immunity suggests that the district court may have erred in granting immunity to the Juneau School Board. Ctr. for Individual Rights *Amicus* Br. at 2. This is of no moment. Frederick did not appeal the district court's ruling on the school

holds Principal Morse to an uncompromisingly high standard in making predictive judgments about future appellate court rulings, is incompatible with this Court's teachings. *Malley*, 475 U.S. at 341.

Respondent asserts that Principal Morse's adherence to the (unchallenged) School Board Policy 5520 was "objectively unreasonable." Resp. Br. at 42 & n.29. This is squarely at odds with this Court's analysis in *Wilson v. Layne*, which recognized that reasonable reliance on established policies and practices may immunize a public official's actions. 526 U.S. 603, 616-17 (1999). Respondent thus ignores the contextual particularity required to find a violation of a "clearly established" right. *Id.* at 616-17.

Respondent further argues that Ninth Circuit case law "appl[ied] with obvious clarity" in allowing students' pro-drug messages. Resp. Br. at 39 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Not so. Indeed, the Ninth Circuit previously had cited with approval the Fourth Circuit's decision in *Williams*, 622 F.2d 1200, which upheld a public high school's ban on distributing an underground newspaper because it contained an advertisement for bongs. *See Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 863 (9th Cir. 1982) (citing *Williams* for the proposition that students' rights "may be modified or curtailed by school policies that are reasonably designed to adjust those rights to the needs of the school environment"). Until the Ninth Circuit's decision below, the court of appeals more seemingly had endorsed the suppression of pro-drug messages by public high schools.

The Ninth Circuit veered far off the path of this Court's qualified immunity jurisprudence. As a result, a fourth-

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board's immunity, and he does not raise it here. He confined his appeal to Ms. Morse's immunity.

generation teacher and second-generation principal who has devoted a decade of her teaching career to special education and ultimately took on the formidable challenge of managing a large urban public high school, now is subjected to the "fear of personal monetary liability and harassing litigation." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). That should not be.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

DEBORAH MORSE, ET AL., PETITIONERS

v.

JOSEPH FREDERICK

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, public schools may prohibit students from promoting the use of illegal substances at school events.

2. Whether petitioner Morse is entitled to qualified immunity from suit based on her decision to discipline a student for displaying a large banner containing a slang endorsement of marijuana at a school event.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the authority of public schools to prohibit student speech that promotes illegal drug use, and the qualified immunity of school officials who punish students for engaging in such speech. The United States has a substantial interest in those questions. The federal government has provided billions of dollars to support state and local drug-prevention programs. Recipients of grants under the Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. 7101 *et seq.*, must "convey a clear and consistent message that the illegal use of drugs * * * [is] wrong and harmful." 20 U.S.C. 7162(a) (Supp. III 2003). The United States administers numerous other programs that seek to deter illegal drug use, particularly among children. The fed-

eral government also operates hundreds of primary and secondary schools on military installations and Indian reservations. Finally, the same principles of qualified immunity that apply in suits against state and local officials apply in similar actions against federal officials.

STATEMENT

1. In January 2002, the Olympic torch was carried through Juneau, Alaska, en route to the Winter Olympic Games in Salt Lake City, Utah. Students in the Juneau public schools were permitted to attend the event during school hours. Most students at Juneau-Douglas High School gathered outside the school building, which was on the torch route. School administrators and teachers accompanied the students. Respondent Joseph Frederick, then a senior at the high school, was unable to reach school on time that morning because of snow in his driveway, but he was able to get to the sidewalk across Glacier Avenue in front of the school. There, he and some classmates unfurled a 14-foot-long banner with the message, "BONG HITS 4 JESUS," just as the torch relay and a television camera crew passed by the school. Pet. App. 2a, 24a-25a, 34a; Br. in Opp. 1 n.1.

Petitioner Juneau School Board has a written policy that "specifically prohibits any assembly or public expression that * * * advocates the use of substances that are illegal to minors" or otherwise "urges the violation of law." Pet. App. 53a. The board's policies likewise prohibit "[t]he distribution on school premises" of "materials that * * * advocate the use by minors of any illegal substance" or otherwise "urge the violation of law." *Id.* at 55a-56a.

In light of those policies, the school's principal, petitioner Deborah Morse, asked respondent to take down

the banner. When he refused, she took down the banner and later issued respondent a ten-day suspension. Pet. App. 2a. She told him that the banner "violated the [school] policy against displaying offensive material, including material that advertises or promotes use of illegal drugs." *Id.* at 3a. Although the banner did not physically disrupt the parade, the principal believed that it "sparked" subsequent pro-drug graffiti in the school. *Id.* at 2a. School officials determined that "[f]ailure to react to the display would appear to give the district's imprimatur to [the banner's pro-drug] message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior." *Id.* at 3a.

2. Respondent unsuccessfully appealed his suspension, first to the school superintendent. Pet. App. 59a-67a. The superintendent concluded that respondent's advocacy of illegal drugs was "potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use." *Id.* at 62a. This Court's decision in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986), the superintendent reasoned, "teaches that the First Amendment does not require school districts to tolerate student speech that 'would undermine the school's basic educational mission.'" Pet. App. 61a.

The superintendent determined that respondent's banner "appeared to advocate the use of illegal drugs." Pet. App. 61a. "The common-sense understanding of the phrase 'bong hits,'" the superintendent explained, is "a means of smoking marijuana," and respondent failed to identify "any other credible meaning for the phrase." *Ibid.* The superintendent further found that respondent

"was not advocating legalization of marijuana or promoting a religious belief." *Id.* at 62a.

The superintendent also rejected respondent's contention that "he was not participating in a school activity." Pet. App. 63a. The superintendent noted that "teachers were authorized to allow their students to attend * * * as a class, provided the students were supervised at all times"; the school's "band was performing while students waited for the torch to arrive"; and "[t]he school district expended funds so that other students attending schools that were not on the torch route could bus their students to another location to see the event." *Ibid.* The superintendent "believe[d] it unreasonable to find that [respondent] can stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." *Ibid.* Respondent appealed to the Juneau School Board, which adopted the superintendent's opinion. *Id.* at 68a-69a.

3. Respondent then filed suit against petitioners in federal district court, alleging that they were liable under 42 U.S.C. 1983 for violating his First Amendment rights. The district court granted summary judgment in favor of petitioners. Pet. App. 23a-42a. As a threshold matter, the court concluded that the students' viewing of the Olympic torch relay was a school-sponsored activity. *Id.* at 33a-35a. It pointed to evidence that, based on the event's "educational value and significance to the community," the principal had "authorized the teachers to take their classes to view the relay," "the band and cheerleaders were organized to greet the relay participants," and "teachers and administrative officials monitored students' actions." *Id.* at 34a.

Looking to this Court's student speech precedents, the court determined that petitioners had authority to

prohibit the banner because "this is not a case like *Tinker* [v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969),] where students chose to make a statement of personal opinion that was unrelated to the school's mission. To the contrary, [respondent's] statements directly contravened the Board's policies relating to drug abuse prevention." Pet. App. 35a-36a.

The court rejected respondent's argument that his banner did not advocate illegal drug use. Pet. App. 37a-38a. The court explained that "the determination of an administrator that a particular statement is in violation of school policy is generally not scrutinized so long as the administrator's interpretation is reasonable." *Id.* at 37a. Here, respondent's "admi[ssion] that the terms he used, including 'bong' and 'hit,' could be understood to refer to drugs shows that [petitioners'] understanding was reasonable." *Id.* at 38a.

The district court also held that petitioners in any event were protected by qualified immunity from suit for damages under Section 1983 because petitioner Morse "reasonably believed that she could and should suppress speech that encourages drug use among students in light of the decision in *Fraser* and the Board's policies prohibiting such language." Pet. App. 28a.

4. The court of appeals vacated and remanded. Pet. App. 1a-22a. At the outset, the court concluded that "this [is] a student speech case," in part because respondent "was a student, and school was in session." *Id.* at 5a, 6a. "[P]roceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," the court held that respondent's speech was nonetheless protected by the First Amendment because "a school cannot censor or punish students[']' speech merely be-

cause the students advocate a position contrary to government policy." *Id.* at 6a-7a, 8a.

The court acknowledged that *Fraser* recognizes the authority of public schools to prohibit student speech that "would undermine the school's basic educational mission." Pet. App. 11a (quoting *Fraser*, 478 U.S. at 685). But the court observed that a public school "is not entitled to suppress speech that undermines whatever missions it defines for itself." *Id.* at 12a. Instead, the court concluded, "student speech that is neither plainly offensive nor school-sponsored can be prohibited only where the school district demonstrated a risk of substantial disruption." *Id.* at 14a. According to the court, "[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' in the way sexual innuendo [the speech at issue in *Fraser*] is." *Id.* at 9a.

Finally, the court rejected petitioner Morse's qualified immunity defense. Pet. App. 18a-22a. It concluded that "no reasonable government official could have believed the censorship and punishment of [respondent's] speech to be lawful." *Id.* at 21a. The court explained that under its precedents, student speech may be prohibited only if it is offensive, disruptive, or school-sponsored, and here "there is nothing in the authorities that justifies what the school did." *Id.* at 20a, 21a.

SUMMARY OF ARGUMENT

I. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 266 (1988) (citation omitted). For at least three reasons, a public school may reasonably conclude

that student advocacy of illegal drug use is fundamentally inconsistent with the school's basic educational mission. First, it is inconsistent with the school's duty to protect the health and safety of students entrusted to its custody and care *in loco parentis*. Illegal drug use poses one of the greatest threats to the health and safety of the Nation's school children. A school district can reasonably conceive of its mission as including not only educating students, but doing so in an environment that keeps them free from the scourge of drugs during their K-12 years. Second, it is inconsistent with the school's need to maintain an effective learning environment, because drug use impedes students' ability to learn and promotes behavior antithetical to the educational mission. Third, it is inconsistent with the school's mission to "inculcat[e] fundamental values necessary to the maintenance of a democratic political system," *Ambach* v. *Norwick*, 441 U.S. 68, 77 (1979), because it encourages disrespect for and violation of the law.

The court of appeals erred in concluding that *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), requires schools to tolerate student advocacy of illegal drug use at school events. Under *Tinker*, schools may not prohibit speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. Petitioners did not, however, prohibit and punish respondent's speech for that reason; instead, they did so because respondent's message was inconsistent with the school's basic educational mission. Unlike respondent's banner, Tinker's armband protesting the Vietnam war did not advocate illegal conduct, and did not address a topic central to a school's basic educational mission.

The court of appeals further erred by applying heightened scrutiny on the theory that respondent displayed his banner off campus. Education occurs both in and out of the classroom, and the fact that field trips and other school events take place off campus does not deprive them of their educational character. Nor does it deprive school officials of the authority to apply school policies to their students. It would be especially illogical to apply heightened scrutiny in the context of this case. Not only was respondent a student attending a school-supervised event during normal school hours, he displayed his banner across the street from his school, in view of classmates on school property.

Petitioners reasonably understood respondent's "BONG HITS 4 JESUS" banner to refer to illegal drug use, and both lower courts properly declined to disturb that finding. Disciplinary decisions are ordinarily committed to the discretion of school administrators, who are in by far the best position to determine the contextual meaning of students' speech. Federal courts should be particularly reluctant to second guess the judgment of school administrators on a matter so central to the educational mission as deterring illegal drug use.

II. Even if petitioner Morse violated respondent's rights, she would be entitled to qualified immunity because it was not clearly established at the time she acted that respondent's conduct was protected by the First Amendment. The Ninth Circuit relied on cases stating generally that *Tinker* governs speech that is neither offensive nor school-sponsored. But the "question whether the right was clearly established must be considered on a more specific level." *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). None of the cases relied on by the court of appeals addressed whether student advocacy of illegal

drug use is offensive to a school's basic educational mission, whether such advocacy satisfies *Tinker*'s interference standard, or whether different standards apply to student speech near, but not on, school premises.

ARGUMENT

I. PUBLIC HIGH SCHOOLS MAY DISCIPLINE STUDENTS WHO, WHILE ATTENDING SCHOOL EVENTS, ADVOCATE ILLEGAL DRUG USE

A. The First Amendment Does Not Protect Student Speech Contrary To A School's Basic Educational Mission, Including Speech That Advocates Illegal Drug Use

1. While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986); accord *Kuhlmeier*, 484 U.S. at 266. Instead, the First Amendment—like other constitutional rights—"must be 'applied in light of the special characteristics of the school environment.'" *Kuhlmeier*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).[1]

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[1] Many constitutional rights apply differently in the school setting. See, *e.g.*, *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985) ("It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."); *Board of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822 (2002) (same); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 651 (1995) (same); *Ingraham* v. *Wright*, 430 U.S. 651, 682 (1977) (constitutional "safeguards [on corporal punishment] would * * * entail a significant intrusion into an area of primary educational responsibility"); *Goss* v. *Lopez*, 419 U.S. 565, 584 (1975) (disciplinary suspension ordinarily requires only "rudimentary procedures").

"The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by" this Court. *Ambach*, 441 U.S. at 76; see *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954); 20 U.S.C. 7247(a)(1) (federal grants for "character education"). Because the task of educating the Nation's children vests public schools with responsibility to teach impressionable young students, a school may prohibit student speech that "would undermine the school's basic educational mission." *Fraser*, 478 U.S. at 685; see *Kuhlmeier*, 484 U.S. at 266 ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school.") (quoting *Fraser*, 478 U.S. at 685); pp. 14-21, *infra*. Indeed, even outside of the school context, this Court has "repeatedly recognized the governmental interest in protecting children from harmful materials," *Reno* v. *ACLU*, 521 U.S. 844, 875 (1997), and has therefore upheld restrictions on expression that would be unconstitutional if applied to adults. *Ginsberg* v. *New York*, 390 U.S. 629, 637 (1968) (sale of pornography to minors).

2. Student advocacy of illegal drug use at a school event is manifestly inconsistent with a public school's basic educational mission, and therefore outside of the First Amendment's protection.

a. First. there are few greater threats to the Nation's school children and public education system than illegal drugs. School authorities act *in loco parentis*, with responsibility for the health and safety of students entrusted to their custody. *Vernonia*, 515 U.S. at 654-655; *Earls*, 536 U.S. at 830. In discharging that responsibility, the Juneau public schools, like public schools

across the country, have adopted a health and safety curriculum that, among other things, educates students about the dangers of illegal drug use and discourages them from engaging in such activity. See J.A. 80, 83-87.

The health and safety mission of our public schools is especially pronounced in the context of this case. School children are not only more vulnerable to drug use than adults, but such abuse is more likely to devastate their lives. "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. 'Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound'; 'children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.'" *Vernonia*, 515 U.S. at 661 (quoting Hawley, *The Bumpy Road to Drug-Free Schools*, 72 Phi Delta Kappan 310, 314 (1990)); see Office of Nat'l Drug Control Policy, *National Drug Control Strategy: 2001 Annual Report* 10. Certainly, a school can conceive of its mission as involving not only the graduation of well-educated students, but students who have emerged from their K-12 years free from the scourge of illegal drugs.

Second, not only does student advocacy of illegal drug use undermine a school's anti-drug curriculum, it also places the school curriculum as a whole in jeopardy, for the use of illegal drugs harms the educational process itself. Students who use illegal drugs are more likely to suffer from impaired cognitive capabilities, more likely to struggle in the classroom, and more likely to leave school prematurely.[2] Moreover, the effects of

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[2] See, *e.g.*, Office of Applied Studies, Substance Abuse and Mental Health Services Administration, *Academic Performance and Sub-*

illegal drug use by students "are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Vernonia*, 515 U.S. at 662. "[D]rug or alcohol use" by school children is, quite simply, "inconsistent with 'the shared values of a civilized social order.'" *Kuhlmeier*, 484 U.S. at 272 (quoting *Fraser*, 478 U.S. at 683).

Finally, advocating any illegal behavior—including use of illegal drugs—is antithetical to the educational mission. As this Court emphasized in *Fraser*, schools must "inculcat[e] fundamental values necessary to the maintenance of a democratic political system." 478 U.S. at 681 (quoting *Ambach*, 441 U.S. at 77). Thus, "teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society." *Ambach*, 441 U.S. at 78. Respect for the law is a fundamental democratic value, because our society depends on the willingness of its members to work to change objectionable laws, rather than simply violating them. Advocacy of unlawful conduct therefore strikes at the heart of a school's basic educational mission to teach fundamental democratic values.

b. Given the extent to which students conform their actions to the behavior and values of their peers, speech advocating the use of illegal drugs is particularly damaging when it comes from students. Peer pressure is a major factor in childrens' decision to use drugs. See *Earls*, 536 U.S. at 840 (Breyer, J., concurring); *Vernonia*, 515 U.S. at 663 (discussing a school's "drug prob-

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stance Use Among Students Aged 12 to 17: 2002, 2003, and 2004 (2006); National Institute on Drug Abuse, National Institutes of Health, Research Report Series, *Marijuana Abuse* 1, 5 (2005); Michael Lynskey and Wayne Hall, *The Effects of Adolescent Cannabis Use on Educational Attainment: A Review*, 95 Addiction 1621, 1621-1629 (2000).

lem largely fueled by the 'role model' effect of athletes' drug use"). As a result, an effective anti-drug program must not only teach the dangers of drugs; it must also protect impressionable young people from the countervailing effects of peer pressure. At a minimum, such a program entails prohibiting student advocacy of illegal drug use in school or at school events, where students are entrusted to the schools' care.

In the Safe and Drug-Free Schools and Communities Act of 1994, 20 U.S.C. 7101 *et seq.*, Congress recognized the importance of sending a "clear and consistent message" to impressionable school-age children that illegal drug use is unacceptable. 20 U.S.C. 7162(a) (Supp. III 2003). Congress authorized federal grants under that statute to support, among other things, "local programs of school drug * * * prevention." 20 U.S.C. 7102(1) (Supp. III 2003). Significantly, applications by local educational agencies must contain "assurance[s] that drug * * * prevention programs supported [by the grant] * * * convey a *clear and consistent message* that * * * the illegal use of drugs [is] wrong and harmful." 20 U.S.C. 7114(d)(6) (Supp. III 2003) (emphasis added); see 20 U.S.C. 7162(a) (Supp. III 2003). By prohibiting student advocacy of illegal drugs, the schools are not only acting on the basis of their own educational judgments; they are acting consistent with federal policy.

The anti-drug curriculum in schools is especially important in light of the "drug problem in our Nation's schools," which is "serious in terms of size, the kinds of drugs being used, and the consequences of that use." *Earls*, 536 U.S. at 839 (Breyer, J., concurring). In 2005, approximately one-half of all students in the twelfth grade had used an illicit drug, and more than one-half of those students had used an illicit drug other than mari-

juana. 1 National Institute on Drug Abuse, National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975-2005*, at 99 (2006). Indeed, approximately one-fourth of twelfth graders had used an illicit drug *in the past 30 days*. *Id.* at 101. In light of the gravity of the problem, this Court has recognized that the governmental interest in deterring drug use by school children is "important—indeed, perhaps compelling." *Vernonia*, 515 U.S. at 661. In fact, "few interests are more 'compelling' than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 599 (2001) (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citation omitted).

B. While Student Speech May Not Be Banned Merely To Avoid Controversy, It May Be Banned If It Is Inconsistent With A School's Basic Educational Mission

The court of appeals erred in concluding that *Tinker* prevents schools from prohibiting student advocacy of illegal drug use at school events. See Pet. App. 7a-8a. This case is governed not by *Tinker*, which applies when a school merely seeks to avoid controversy and prevent disturbances, but instead by *Fraser* and *Kuhlmeier*, which confirm that a school can prohibit speech inconsistent with its basic educational mission.

1. The court of appeals believed that under *Tinker*, "students retain First Amendment expression rights at school, which may be suppressed only if authorities reasonably 'forecast substantial disruption of or material interference with school activities.'" Pet. App. 5a n.3

(quoting *Tinker*, 393 U.S. at 514). The "only" in that sentence is where the Ninth Circuit went wrong.

In *Tinker*, a school prohibited students from wearing armbands to school to protest the Vietnam war. 393 U.S. at 504. After explaining that the school prohibited the armbands "to avoid the controversy which might result from the expression" (out of a belief that "the schools are no place for demonstrations"), this Court held that "to justify prohibition of a particular expression of opinion, [a school] must be able to show that its action was caused by *something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.*" *Id.* at 509 & n.3, 510 (emphasis added). It was only in that context—where the asserted governmental interest was preventing controversy—that the Court stated that a student "may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513 (citation omitted).

Significantly, the *Tinker* Court made clear that schools can restrict student speech for reasons *other than* avoiding controversy. The Court stressed, for example, that "this case does not concern speech or action that intrudes upon the work of the schools," because "[t]here is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work." 393 U.S. at 508.

Hence, the circumstances in *Tinker* were quite different in several respects. The asserted governmental interest here is not preventing controversy, but preventing illegal drug use—a matter that, as discussed, di-

rectly threatens the basic educational mission of schools. While the students in *Tinker* opposed the Vietnam war, they did not advocate lawless action, such as illegal resistance to the draft or vandalism of recruiting stations.

Moreover, while the court of appeals viewed this case as presenting the general question whether a school can prohibit "a social message contrary to the one favored by the school," Pet. App. 7a, this case does not involve just any "social message"—it involves advocacy of dangerous drug use, which, unlike the speech in *Tinker*, "interfere[s] with the work of the school," *Tinker*, 393 U.S. at 509. The educational mission and *in loco parentis* responsibilities of schools do not require them to take a stand on the advisability of a foreign war waged by the federal government. But they most certainly do require schools to protect students' health, safety, and ability to learn. See pp. 10-12, *supra*. That point is confirmed by Congress's insistence that grant recipients under the Safe and Drug-Free Schools and Communities Act of 1994 "convey a clear and consistent message that the illegal use of drugs * * * [is] wrong and harmful," 20 U.S.C. 7162(a) (Supp. III 2003), as well as by this Court's cases stressing the importance of the schools' interest in combating student drug use. See pp. 13-14, *supra*.

Any remaining doubt should be resolved in favor of the school district's educational judgment, set forth in its written policies. "No single tradition in public education is more deeply rooted than local control," *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974), and this case underscores the wisdom of the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*,

484 U.S. at 273. The school board's decision to oppose illegal drug use as part of its basic educational mission, and to disassociate itself from pro-drug speech by banning it at school events, represents an unassailable, common-sense educational judgment entitled to deference from the federal courts. The Ninth Circuit's test, by contrast, would put federal courts in a difficult position of second-guessing local school boards and the reasonableness with which local officials forecast disruption of school activities. As this case amply demonstrates, that is not an appropriate role for a federal court.

In any event, even if *Tinker*'s "interference with school activities" standard applied in this context (393 U.S. at 514), it would be satisfied. *Tinker* did not consider only whether classroom activities were disrupted. Instead, it looked broadly to whether there was interference—"actual or nascent"—with "the work of the schools *or* any class." *Id.* at 508 (emphasis added). If schools permitted advocacy of illegal drugs, such speech could counteract, if not drown out, the schools' anti-drug message, especially because of peer pressure. Permitting students to make light of the school's anti-drug message or launch a pro-drug use campaign would undermine both that message and the school's disciplinary authority generally. There is no reason a school should have to wait and see whether speech promoting illegal drug use actually has that effect before taking action, especially where, as here, the question concerns the educational message conveyed to students, not the avoidance of controversy. Cf. *Earls*, 536 U.S. at 836 ("[I]t would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.").

Here, moreover, the school had gathered its students to view the relay of the Olympic torch. The juxtaposition between an event honoring amateur athletic competition and the use of marijuana made the speech particularly disruptive. By unveiling his bong-hits banner just as the torch passed, see Pet. App. 25a, respondent both exploited the event to maximize the impact of his message and interfered with the work of the schools by distracting others' attention from the very event the school wanted them to observe. And the potential reach of the message was magnified still further by the fact that respondent unfurled the banner right as a television camera crew walked by, which had the potential of increasing the publicity surrounding the banner. *Id.* at 2a.

2. Any doubt regarding the validity of petitioners' response is removed by *Fraser* and *Kuhlmeier*. In *Fraser*, the Ninth Circuit held that *Tinker* barred a school from punishing a student for making a sexually suggestive speech at a school assembly. 478 U.S. at 679-680. This Court reversed. Explaining that the *Tinker* Court had been "careful to note that [*Tinker*] did 'not concern speech or action that intrudes upon the work of the schools or the rights of other students,'" this Court held that schools may prohibit "lewd, indecent, or offensive speech." *Id.* at 680, 683 (quoting *Tinker*, 393 U.S. at 508). The Court explained that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech * * * would undermine the school's basic educational mission." *Id.* at 685. Thus, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-686.

In *Kuhlmeier*, this Court summed up the relationship between *Tinker* and *Fraser*. Under *Tinker*, the Court explained, students "cannot be punished *merely* for expressing their personal views * * * unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 509). But under *Fraser*, the Court continued, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" *Ibid.* After discussing those two categories of student expression, the Court in *Kuhlmeier* then addressed a third, holding that a school has even greater latitude in regulating student speech when the speech is sponsored by the school, such as in a school-published newspaper. *Id.* at 273.[3]

Fraser and *Kuhlmeier* thus confirm that public schools may prohibit speech that is inconsistent with their basic educational mission in order to disassociate themselves from such speech, and thereby reinforce the values—here, avoidance of illegal drug use—they seek to teach. As the Fourth Circuit explained in upholding a school's prohibition on the distribution of a student newspaper containing an advertisement for illegal drug equipment, disruption under *Tinker* "is merely one justification for school authorities" to restrict student speech; it is not "the sole justification." *Williams* v. *Spencer*, 622 F.2d 1200, 1206 (1980). And here, the school can prohibit student advocacy of illegal drug use

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[3] When a school affirmatively seeks to advance or encourage student expression as part of its educational mission, it has broad latitude to act based on any "legitimate pedagogical concerns," including concerns that speech is "ungrammatical, poorly written, inadequately researched, [or] biased or prejudiced." *Kuhlmeier*, 484 U.S. at 271, 273.

on the ground that such speech would be inconsistent with the school's basic educational mission. *Boroff* v. *Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000), cert. denied, 532 U.S. 920 (2001); see *id.* at 472, 474 (Gilman, J., dissenting on other grounds).

The court of appeals attempted to limit *Fraser* to its facts by stating that this case, unlike *Fraser*, does not involve sexually offensive speech. Pet. App. 9a. As discussed above, however, the reason this Court held that sexually offensive speech could be prohibited is that it is "inconsistent with the 'fundamental values' of public education." *Fraser*, 478 U.S. at 685-686. Nothing in *Fraser* supports the novel proposition that *only* sexual speech can be inconsistent with a school's basic educational mission. While sexual innuendo may be "seriously damaging" to students, *id.* at 683, there is no comparison with the toll that illegal drug use may have on the lives of school children and the threat posed by illegal drugs in the Nation's schools, see pp. 10-14, *supra*.

Nor is *Fraser* distinguishable on the ground that it permits punishment based solely on the manner, as opposed to the content, of student speech. The speech at issue in *Fraser* did not include any profane words; instead, this Court explained that it was the "sexual *content* of [the student's] speech" that distinguished it from Tinker's armband. *Fraser*, 478 U.S. at 680 (emphasis added); see *id.* at 691 (Stevens, J., dissenting on other grounds) ("[A] school faculty must regulate the content as well as the style of student speech in carrying out its educational mission."); cf. *id.* at 687 (Brennan, J., concurring in the judgment) (quoting the student speech).

The court of appeals stated that "government is not entitled to suppress speech that undermines whatever missions it defines for itself," and there must be "some

limit on the school's authority to define its mission." Pet. App. 11a, 12a. As discussed, however, petitioners' effort to combat illegal drug use by students is hardly some illegitimate, self-appointed mission; to the contrary, it is fundamental to the school's discharge of its most basic responsibilities to protect the health and safety of students entrusted to its care, maintain an effective learning environment, and teach democratic values (including respect for the law). See pp. 10-14, *supra*. Courts owe great deference to the judgments of school officials regarding their educational mission. In any event, whatever doubt might exist at the outer edges of a school's educational mission, the speech at issue in this case cuts to the core of that mission.[4]

C. Respondent Was Participating In A School Event

The court of appeals acknowledged that petitioners might be able to prohibit respondent's message during some school events, but held that they could not do so here because the Olympic torch relay was not an "official school activity," but instead "took place out of school while students were released." Pet. App. 10a, 11a. That holding is difficult to square with the court of appeals' own recognition that this is a "student speech case." *Id.* at 1a, 5a. As the court of appeals explained, respondent was a student, school was in session, the school released students from their classrooms for the specific

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[4] To be sure, the First Amendment generally protects "advocacy of * * * law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam). The standard is different in the school context in light of the unique concerns recognized by this Court's cases. Accordingly, schools need not tolerate speech advocating lawless action that the government would lack authority to proscribe outside the school context.

purpose of watching the Olympic torch relay in front of the school, and the students were subject to at least some measure of supervision. *Id.* at 5a.

That the relay occurred on a public street and not in a classroom is of no moment. As this Court has explained, education occurs both in and out of the classroom. See *Fraser*, 478 U.S. at 683 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class."); cf. *Tinker*, 393 U.S. at 512-513. Field trips, for example, are an integral part of the learning experience, and the fact that they take place off campus does not deprive them of their educational character or diminish the authority of school officials to regulate student conduct and expression to ensure that the school's educational mission is not undermined. *A fortiori*, the fact that students cross the street to participate in a school event does not deprive the event of its educational character.

The court of appeals acknowledged that "[o]ne can hypothesize off-campus events for which the students might be released that would be educational and curricular in nature," but decided that "a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event." Pet. App. 12a. The court gave no basis for that distinction, and there is none. Coca Cola may have sponsored the relay, but the school sponsored its students' attendance at that event, just as a school sponsors its students' attendance at a museum, theatrical production, or other cultural event that may enjoy corporate sponsorship. Here, because school was in session, the school's decision to authorize students to view the event was the only reason respondent was not required to be in a classroom.

Nor is there is any basis in the First Amendment for applying different levels of scrutiny to student conduct or expression at different off-campus school events. Regardless of the type of event, the school's educational mission, custodial responsibilities, and interest in regulating student conduct and expression remain, no matter how much the Ninth Circuit might question the pedagogical significance of this or any other event. Indeed, schools have an additional interest in establishing standards of appropriate behavior when students attend school events away from school premises, in order to prepare students for life in the broader world and instill values of respect and civility when they interact with others outside the immediate school environment. Accordingly, the school board's written disciplinary policies in this case apply to "approved social events and class trips" in the "same manner" they apply to "the regular school program." Pet. App. 58a. Applying different standards at different off-campus events would send mixed signals to students, and would make it very difficult for courts, let alone school administrators and teachers with little or no legal training, to do their jobs.

This is a particularly unlikely case for heightened scrutiny because the Olympic torch relay passed directly in front of respondent's school, and students watched from both sides of the street. See Pet. App. 2a, 63a; J.A. 9, 15. Which side of the street respondent chose to stand on during a school event is simply not a constitutionally dispositive fact. Moreover, respondent unfurled his banner in view of students who were watching the relay from school grounds. Pet. App. 30a n.21. Especially when a student displays a message to other students who are on school grounds during normal school hours, normal student-speech principles apply.

D. Petitioners Reasonably Understood Respondent's Banner To Advocate Illegal Drug Use

1. When the government acts as sovereign to regulate expression, courts ordinarily make an independent assessment of the facts. See, *e.g.*, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648-649 (2000). When the government does not act merely as a sovereign, however, different procedures apply. For example, in the context of public employment, where the government may prohibit some speech by employees that it could not punish outside of the employment relationship, the courts consider the facts "as the employer *reasonably* found them to be," including facts concerning "what the speech was, in what tone it was delivered, [and] what the listener's reactions were." *Waters* v. *Churchill*, 511 U.S. 661, 668, 676-677 (1994) (plurality opinion); see *id.* at 685 (Souter, J., concurring) (explaining that the *Waters* plurality opinion is "the holding of the Court" because a "majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable"). This Court explained that employers should be able to rely in part on their own experience and knowledge, and not be constrained by how a lay jury would understand the facts. See *id.* at 676.

Those considerations apply with even greater force in schools, where school administrators' day-to-day experiences with students committed to their custody and care give them by far the best understanding of the meaning of students' language, how that language is understood by other students, and the risks the speech poses in the school environment. Similarly, disciplinary decisions are ordinarily committed to school administrators' discretion, *Ingraham*, 430 U.S. at 681-682, in part

because "[e]vents calling for discipline are frequent occurrences," requiring that discipline be both "swift and informal" to be effective. *T.L.O.*, 469 U.S. at 339, 340 (quoting *Goss*, 419 U.S. at 580). And school administrators may impose corporal punishment based on their reasonable belief that it is necessary for a child's education. *Ingraham*, 430 U.S. at 661. It would be anomalous at best to employ a more stringent standard of review for a school official's factual assessments underlying a student's suspension than for assessments underlying a student's corporal punishment or an employee's firing.

Although the *Fraser* Court did not address that question because it found the student speech "plainly offensive," 478 U.S. at 683, Justice Brennan's concurrence found the school officials' punishment of the speech permissible because it was "not unreasonable," *id.* at 689 n.2. In *Kuhlmeier*, this Court likewise reviewed censorship of a school-sponsored student newspaper for reasonableness. 484 U.S. at 273, 274. Similarly here, when a school administrator reasonably construes a student's speech to advocate illegal drug use, the courts should accept that construction.

2. Petitioners reasonably understood respondent's banner to advocate illegal drug use. Following an administrative process during which respondent was represented by counsel, the superintendent found that respondent was disciplined "because his speech appeared to advocate the use of illegal drugs." Pet. App. 61a. The phrase "bong hit" is a slang reference to a particular way of smoking marijuana. See, *e.g.*, J.A. 117. Respondent himself "admitted that the terms he used, including 'bong' and 'hit,' could be understood to refer to drugs," Pet. App. 38a, and that "many people have taken that to be the meaning," J.A. 59. While the additional phrase "4

Jesus" is presumably unusual in this context, the fact remains that the banner advocated "bong hits," *i.e.*, illegal marijuana use, and that petitioners were in the best position to evaluate how the banner would be perceived by other students. Thus, the superintendent was on firm ground in "agree[ing] with the principal and countless others who saw the banner as advocating the use of illegal drugs." Pet. App. 61a-62a.

Neither of the lower courts took issue with that conclusion. The district court held that the school "administrator's interpretation [of respondent's message] is reasonable," Pet. App. 37a, and the court of appeals likewise "proceed[ed] on the basis that the banner expressed a positive sentiment about marijuana use, however vague and nonsensical," *id.* at 6a-7a. There is no reason for this Court to reach a different conclusion.

3. The court of appeals expressed the view that "it is not so easy to distinguish speech about marijuana from political speech" in Alaska, in part because "referenda regarding marijuana legalization repeatedly occur" there. Pet. App. 9a. Respondent expressly advocated bong hits, however, not the legalization of bong hits, and the superintendent found that he "was not advocating the legalization of marijuana." *Id.* at 62a. That reasonable finding is entitled to deference, as discussed above, and was not disturbed by either of the lower courts, notwithstanding the court of appeals' ruminations about the politics of marijuana in Alaska.[5]

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[5] The court of appeals observed that the legality of marijuana use in Alaska is "complicated" because Alaska courts have held that Alaska law does not prohibit adults from possessing small amounts of marijuana in their homes for personal use. Pet. App. 6a n.4; see *Noy* v. *State*, 83 P.3d 538, 542 (Alaska Ct. App. 2003). There is no question, however, that federal law prohibits marijuana possession and use,

In any event, even if respondent's banner were somehow understood to advocate legalization of marijuana, that would not immunize it from school discipline. Under *Fraser* and *Tinker*, the ultimate question is not whether student speech could be considered "political," but whether it is inconsistent with the schools' basic educational mission. See pp. 18-19, *supra*. *Tinker* recognizes that there may be times and places in the school setting where political speech is out of place. See, *e.g.*, 393 U.S. at 508. If a student brought a copy of a court decision concerning marijuana's legal status to school and opined on a point of law in civics class, that speech presumably would be protected. But at the same time, "legalize" is not a magic word that clothes speech advocating drug use from school discipline. And students do not have a First Amendment right to display "legalize marijuana" *banners* at school assemblies—or at school-supervised events like the one at issue here. As a practical matter, whether student speech is protected will depend on context, and courts should defer to the reasonable judgments of school administrators on such contextual evaluations.

II. EVEN IF RESPONDENT'S DISPLAY OF THE BANNER WERE CONSTITUTIONALLY PROTECTED, PETITIONER MORSE WOULD BE ENTITLED TO QUALIFIED IMMUNITY

Petitioner Morse would be entitled to qualified immunity even if respondent's speech were protected by the First Amendment. "Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial

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Gonzales v. *Raich*, 545 U.S. 1, 14 (2005), and that Alaska law also prohibits marijuana possession and use by minors, *Noy*, 83 P.3d at 541.

is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was." *Will* v. *Hallock*, 126 S. Ct. 952, 959 (2006). In determining whether "the law on point" was clear, this Court has repeatedly emphasized that the relevant "law" is that applicable in "the specific context of the case, not as a broad general proposition." *Brousseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201). Absent qualified immunity, school administrators' ability to maintain discipline in the schools could be chilled by the prospect of personal liability.

As recently as 2005—three years after the events in this case—the en banc Seventh Circuit noted that "[m]any aspects of the law with respect to students' speech * * * are difficult to understand and apply." *Hosty* v. *Carter*, 412 F.3d 731, 739 (2005), cert. denied, 126 S. Ct. 1330 (2006). Of particular relevance, there has been a continuing debate over how to reconcile *Fraser* with *Tinker*. See, *e.g.*, *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting), petition for cert. pending, No. 06-595 (filed Oct. 26, 2006). Even a recent decision that agreed with aspects of the decision below emphasized that "the unsettled waters of free speech rights in public schools" are "rife with rocky shoals and uncertain currents," especially with respect to the relationship between *Fraser* and *Tinker*. *Guiles* v. *Marineau*, 461 F.3d 320, 321 (2d Cir. 2006); see *id.* at 326.

The court of appeals nonetheless made the implausible assertion that "opacity in this particular corner of the law has been all but banished" by an earlier Ninth Circuit case stating generally that "the standard for reviewing the suppression of vulgar, lewd, obscene, and

plainly offensive speech is governed by *Fraser*, school-sponsored speech by [*Kuhlmeier*], and all other speech by *Tinker*," *Chandler* v. *McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (citations omitted). Pet. App. 20a. That tripartite framework is incomplete, but even if it were accurate, it could at best provide a starting point for the analysis. As in *Saucier*, the "question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals." 533 U.S. at 200. The law must provide an official clear notice "that his conduct was unlawful *in the situation he confronted*." *Id.* at 202 (emphasis added); accord *Brosseau*, 543 U.S. at 198.

Under those standards, *McMinnville* would have clearly established respondent's alleged right only if it were also clear that respondent's banner was not plainly offensive or school-sponsored and did not satisfy the *Tinker* interference standard. At the time petitioners acted, however, there was no authoritative judicial resolution on whether student advocacy of illegal drug use enjoys First Amendment protection. The only case cited by the court of appeals that dealt with a pro-drug message *upheld* the school administrators' decision to prohibit and punish the speech, albeit in a distinguishable context. See *Boroff*, 220 F.3d at 470. *McMinnville* likewise acknowledged that "schools need not tolerate student speech that is inconsistent with [their] 'basic educational mission.'" 978 F.2d at 527 (quoting *Fraser*, 478 U.S. at 685). But it had no occasion to discuss the relevance of that principle in circumstances analogous to this case, because the question there was whether buttons worn by students containing the word "scab" were offensive or disruptive. *Id.* at 530.

Even setting to the side the longstanding uncertainty concerning the relationship between *Tinker* and *Fraser*, the Ninth Circuit ultimately relied on the unique facts of this case by stating that petitioners might have been able to prohibit respondent's message on a T-shirt, on school grounds, or at a different type of off-campus event. Pet. App. 12a, 17a n.45. Those are precisely the types of subtle distinctions, unresolved in existing precedents, upon which school administrators' personal liability ought not turn. Indeed, the court of appeals held that school administrators, who are not ordinarily lawyers, should have been able to discern a constitutional line that the district court (which ruled in petitioners' favor) was unable to detect.

Even the court of appeals did not assert that all of its distinctions were clearly established in the law. Instead, while conceding that "[w]e have no Ninth Circuit authority precisely on point," the court stated that "what we do have is *consistent*" with the court's holding. Pet. App. 12a (emphasis added). The court also stated elsewhere in its opinion that "there is nothing in the authorities that justifies what the school did," *id.* at 21a, in part because cases holding "that conduct like Morse's is not a constitutional violation" were distinguishable, *id.* at 19a. In effect, the court thereby inverted the analysis by asking whether it was clearly established that petitioners' conduct was *lawful*, not whether it was clearly established that their conduct was *unlawful*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE, JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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INTEREST OF *AMICUS CURIAE*[1]

The Alliance Defense Fund ("ADF") is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, ADF has played a role, either directly or indirectly, in many cases before this Court, including *Scheidler v. National Organization for Women (NOW)*, 126 S.Ct. 1264 (2006), *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S.Ct. 1297 (2006), *Gonzales v. O Centro Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *City of Los Angeles v. Alameda Books*, 536 U.S. 921 (2002), *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Troxel v. Granville*, 530 U.S. 57 (2000), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Washington v. Glucksberg*, 521 U.S. 702 (1997), *Vacco v. Quill*, 521 U.S. 793 (1997), *Agostini v. Felton*, 521 U.S. 203 (1997), *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), *American Library Association v. Reno*, 515 U.S. 557 (1995), as well as hundreds more in the lower courts.

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[1] According to Counsel of Record for Respondent, the parties have submitted to this Court a standing agreement consenting to the filing of all *amicus curiae* briefs. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

Included in these cases are a significant number of student speech cases around the country. For instance, ADF represents the Harpers in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), *petition for cert. filed*, No. 06-595 (filed Oct. 26, 2006). Like the speech at issue in this case, religious speech can be controversial. As such, it is often the target of censorship in our Nation's public schools. Recognizing that this case will potentially have a profound impact on the landscape of students' speech rights, ADF is seeking to ensure that the freedom of expression and the opportunity for rigorous debate of controversial ideas—which are essential to our democratic system—are jealously guarded within our schools.

SUMMARY OF ARGUMENT

This brief addresses two primary issues: first, whether this Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) ("*Fraser*") allows schools to censor any student expression that it believes is inconsistent with its educational mission; and second, whether this Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) ("*Tinker*") allows schools to censor speech merely because it is offensive or derogatory.

Both should be answered in the negative. This Court should affirm that *Fraser* allows schools to restrict vulgar speech, profanity, and other *manners of speech* that are inappropriate for public discourse, particularly in the school environment; but it does not allow schools to censor viewpoints with which it disagrees. Petitioners' contention that schools can ban any speech that contradicts their "educational mission"—an inherently vague and infinitely malleable concept—should be flatly rejected. As seen in the

Sixth Circuit's decision in *Boroff v. Van Wert City Board of Education*, Petitioners' reading of *Fraser* would give schools unprecedented discretion in deciding what students may say on campus. The end result would be precisely what *Tinker* said the First Amendment could never allow: an "enclave of totalitarianism" where students are "confined to the expression of those sentiments that are officially approved." 393 U.S. at 511.

This Court should also reject *amici*'s argument that *Tinker*'s prohibition on student speech that invades the rights of other students allows schools to ban speech that is offensive. Although this case is not particularly well-suited for addressing this issue, the Ninth Circuit's recent decision in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006) has amplified the need for clarity on this issue. If this Court decides to address this issue here, it should hold that *Tinker*'s "rights of others" prong applies only to speech that could result in tort liability.

ARGUMENT

I. THIS COURT HAS NEVER ALLOWED SCHOOLS TO CENSOR PRIVATE, NON-DISRUPTIVE STUDENT SPEECH BECAUSE OF THE VIEW IT EXPRESSES.

A. Students do not shed their constitutional rights at the schoolhouse gate.

This Court first demarcated the scope of students' free speech rights on campus in *Tinker*. Starting with the premise that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 393 U.S. at 506, *Tinker* held that schools must tolerate

student speech, including controversial political speech, unless it would materially and substantially disrupt the operation of the school or infringe upon the rights of other students. *Id.* at 513. That is particularly true here, where the plaintiff students never even made it to the schoolhouse.[2]

Since *Tinker*, this Court has carved out two narrow categories of speech that a school may restrict, even without the threat of substantial disruption. The first is graphic sexual innuendo and other profane language. In *Fraser*, this Court emphasized that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." 478 U.S. at 683. This Court said *Tinker* was distinguishable because this restriction is based on the manner of speech, not the viewpoint of the speaker. *Id.* at 685.

Second, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) ("*Hazelwood*"), this Court acknowledged that schools have a special interest in regulating their own speech. *Id.* at 270-71. *Hazelwood* gives schools significant deference in regulating student speech that it sponsors—that is, speech that would reasonably be viewed as bearing the imprimatur of the school. Any such regulation, *Hazelwood* held, need only have a legitimate pedagogical concern. *Id.* at 273.

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[2] *Amicus* submits that school officials could and should have avoided engaging in constitutionally problematic censorship by simply punishing the students for being truant that day. *See Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006).

B. Petitioners and *amici* are asking this Court to substantially limit students' First Amendment rights.

Petitioners, and *amici* supporting them, contend that they were justified in removing Frederick's banner under all three of these cases. *See, e.g.,* Brief for Petitioner, p. 15. This brief responds to two of those contentions: (1) that the banner could be censored under *Fraser* because its message is inconsistent with the Petitioners' "educational mission;" and (2) that the banner could be censored under *Tinker* because it infringed upon the rights of other students.

As explained below, if this Court adopts either of these arguments, it would eviscerate much of the First Amendment freedoms our public school students currently enjoy—opening the door for schools to censor private, non-disruptive student speech solely because the school disagrees with its message. While the school environment admittedly raises unique concerns that justify some limits on students' freedom of expression, the First Amendment is nonetheless alive and well on our Nation's campuses. And "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This principle plays a central role in shaping our democratic society, and cannot be disregarded within our public schools.

II. *FRASER* CANNOT BE READ TO ALLOW A SCHOOL TO CENSOR STUDENT SPEECH WITH WHICH IT DISAGREES.

The central holding of *Fraser* is that the "First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as

respondent's would undermine the school's basic educational mission." 478 U.S. at 685. This statement also forms the premise of Petitioners' argument. They claim that part of a school's educational mission is to "promot[e] a healthy, drug-free lifestyle." Brief for Petitioner, p. 25. And Frederick's banner, because it expressed "a positive sentiment about marijuana use," is inconsistent with this mission. *Id.* Therefore, the argument goes, the school was justified in censoring Frederick's speech under *Fraser*.

This argument ignores the critical distinction between *Fraser* and this case: the censorship in *Fraser* was based on the student's language; the censorship here is based on the student's viewpoint. This distinction is critical because viewpoint discrimination is uniquely repugnant to the First Amendment. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995); *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). As detailed below, the *Fraser* Court strongly suggested that it would not have gone so far as to allow viewpoint discrimination. This Court should also avoid taking such a perilous step.

A. *Fraser* only permits schools to prohibit plainly offensive manners of speech, not plainly offensive viewpoints.

Inculcating habits and manners of civility—by discouraging vulgar and lewd language—is unquestionably an important function of public schools. But the *Fraser* Court viewed this function as a regulation of the language that students use, not the ideas they express.

> Surely it is a highly appropriate function of public school education to prohibit the use of ***vulgar and offensive terms*** in public discourse. Indeed, the "fundamental values necessary to the maintenance

> of a democratic system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain ***modes of expression*** are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools."

Fraser, 478 U.S. at 683 (quoting *Tinker*, 393 U.S. at 508) (emphasis added). This Court used *Cohen v. California*, 403 U.S. 15 (1971), which upheld an adult's First Amendment right to wear a jacket bearing an obscenity in a courthouse, as an example of this distinction:

> It does not follow, however, that simply because the use of an offensive ***form of expression*** may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in public school . . . . [T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.

478 U.S. at 682 (quotation marks and citation omitted; emphasis added). Indeed, the cases *Fraser* relied on all concern vulgar and profane language. *See id.* at 682-85, where the Court cites *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding ban on sale of sexually-oriented materials to minors); *Board of Education v. Pico*, 457 U.S. 853 (1982) (acknowledging that school boards may remove vulgar books from school libraries); and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (holding that FCC may prohibit obscene, indecent, or profane language).

Thus, schools are given significant discretion in deciding what manners of speech are appropriate within the school environment. But this Court repeatedly emphasized its

unwillingness to give the same discretion to schools if they are censoring ideas, rather than language. It stressed that students have "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms," and that an indispensable objective of public education is to teach tolerance of such divergent views. *Fraser*, 478 U.S. at 681. In fact, this Court emphasized that the critical distinction between *Fraser* and *Tinker* was the regulation's viewpoint-neutrality:

> We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case ***were unrelated to any political viewpoint***.

Id., 478 U.S. at 685 (emphasis added).

Justice Brennan's concurrence in *Fraser* further supports this view. He wrote separately to "express [his] understanding of the breadth of the Court's holding." 478 U.S. at 688. Reiterating that the holding was based on the school's interest in teaching students how to engage in appropriate public discourse, he noted that this interest is significantly limited in two ways. First, the context of the speech must be taken into account. Where the student is engaging in true public discourse—here, in a speech at a school-wide assembly—this interest is particularly weighty. *Id.* at 689. But in a different context, even at school, the speech "may well have been protected." *Id.* Second, even in the context of a school assembly, where the school's interest was strongest, it may not engage in viewpoint discrimination. Justice Brennan underscored that there was "no suggestion that school officials attempted to regulate respondent's

speech because they disagreed with the views he sought to express." *Id.*

B. The majority of circuit courts have interpreted *Fraser* narrowly, and the sole minority court reveals the danger in Petitioners' view.

Boroff v. Van Wert City Board of Education, 220 F.3d 465 (6th Cir. 2000)—the only circuit court case that supports Petitioners' view of *Fraser*—provides a perfect example of the danger in interpreting *Fraser* so broadly. *Boroff* involved a high school student who wore a t-shirt to school featuring "goth" rocker Marilyn Manson. *Id.* at 466. The front of the shirt depicted Manson and a three-faced Jesus with the words "See No Truth. Hear No Truth. Speak No Truth." *Id.* at 467. The back had the word "BELIEVE," with the letters "LIE" highlighted. *Id.* On several occasions, the school sent Boroff home from school for wearing the shirt. *Id.*

In a divided opinion, the Sixth Circuit rejected Boroff's constitutional claim, relying on *Fraser*. The court agreed with the school's principal, who thought the shirt was offensive "because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school." *Id.* at 469. The court went beyond the content of the shirt, and considered the views expressed by the band in deciding the shirt's message conflicted with the school's educational mission—vaguely defined by the school as establishing "a common core of values that include human dignity and worth . . . self respect, and responsibility" as well as instilling "an understanding and appreciation of the ideals of democracy and help them to be diligent and competent in the performance of their obligations as citizens." *Id.*

Not only did the Sixth Circuit fail to question this amorphous definition of an "educational mission," but it also

looked beyond the language on the shirt itself to the ideas expressed by the signer it depicted, even referencing song lyrics and media quotes from the singer. *Id.* at 469-70. As one legal commentator noted, the Sixth Circuit's "rationale would permit public school officials to restrict virtually any student speech they deem to be offensive."[3]

By contrast, along with the Ninth Circuit opinion in this case, multiple lower courts have interpreted *Fraser* to apply only to the manner of speech students employ, not their viewpoints. *See, e.g., Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006) ("*Fraser* itself . . . indicated that its rule applies to the 'manner of speech,' i.e., the offensiveness of its form, but not the speech's content"); *Saxe v. State College Area School District*, 240 F.3d 200, 213 (3d Cir. 2001) ("*Fraser* permits a school to prohibit words that offend for the same reasons that obscenity offends—a dichotomy neatly illustrated by the comparison between Cohen's jacket and

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[3] Miller, Andrew D.M., *Balancing School Authority and Student Expression*, 54 Baylor L. Rev. 623, 649 (2002), quoting O'Shea, Kevin, *First Amendment Rights in Education,* First Amendment Rights in Education Project, at 16 (2000). Indeed, legal commentators have been both vocal and unified in their criticism of *Boroff*'s interpretation of *Fraser*. *See, e.g.,* Lavorato, Cindy and Saunders, John, *Public High School Students, T-Shirts, and Free Speech: Untangling the Knots*, 209 Ed. Law Rep. 1, 6-7 (2006) ("The Court's analysis and conclusion [in *Boroff*] raises several concerns, and arguably should not be considered persuasive precedent in any but the Sixth Circuit"); Peterson, Justin T., *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at its Source?*, 3 Mich. St. L. Rev. 931, 948-50 (2005) (noting that *Boroff* illustrates "the confusion that *Fraser* has caused"); Hudson, David L. and Ferguson, John E., *The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. Marshall L. Rev. 181, 203 (2002) (*Boroff* "flies in the face of Constitutional principles that are designed to protect against . . . government preference for certain ideas while punishing those with non-conforming views").

Tinker's armband") (quotation marks and citation omitted); *Newsom v. Albemarle County School Board*, 354 F.3d 249, 256 (4th Cir. 2003) ("When student speech falls within the lewd, vulgar, and plainly offensive rubric, it can be said that *Fraser* limits the form and manner of speech, but does not address the content of the message"); *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 254 (3d Cir. 2002) (noting *Fraser* did not apply because the school "did not contend the [banned] shirt contained indecent language"); *East High Gay/Straight Alliance v. Board of Educaction of Salt Lake City School District*, 81 F.Supp.2d 1166, 1193 (D.Utah 1999) ("*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint").

C. Adopting the view of Petitioners and their supporting *amici* would effectively eliminate the *Tinker* standard.

Fraser cannot be read so broadly as to allow schools to censor all student expression that conflicts with their "educational mission." Otherwise, it would be triggered any time a school decides that something a student says is inconsistent with something it is trying to teach. As the Ninth Circuit noted in this case,

> There has to be some limit on the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of *Tinker* that students do not "shed their constitutional rights to freedom of speech at the schoolhouse gate." Had the school in that case defined its mission as instilling patriotic duty or promoting support for national objectives, it still

> could not have punished the students for wearing the black armbands.

Frederick, 439 F.3d at 1120 (footnote omitted). Countless other examples are available from cases where students' free speech rights have upheld, but no longer would be under Petitioners' interpretation of *Fraser*. In *Newsom*, for example, the Fourth Circuit preliminarily enjoined a middle school policy prohibiting all clothing depicting weapons. 354 F.3d at 261. Echoing Petitioners, the school officials could argue that it is part of a school's educational mission to discourage violence, especially gun-related violence, among students.[4] Similarly, in *Castorina v. Madison County School Board*, the Sixth Circuit held that a school could not ban t-shirt's bearing Confederate flags without any showing of disruption. 246 F.3d 536, 542 (6th Cir. 2001). Under a broad reading of *Fraser*, the court certainly could have upheld the ban, noting the important educational mission of promoting racial harmony among the student body. And in *Saxe*, the Third Court struck down a school district policy prohibiting derogatory or negative speech about issues such as racial customs, religious tradition, and sexual orientation. 240 F.3d at 217. "Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights." *Id.* This policy was derived in an attempt to provide students "with a safe, secure, and nurturing school environment" and with the admonition that "disrespect among members of the school community is unacceptable behavior which threatens to disrupt the . . . well being of the individual." *Id.* at 202. This could certainly be

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[4] In fact, the school did make this very argument, contending that schools had an obligation "to discourage and prevent gun-related violence since the images on Newsom's t-shirt conflicted with the message that 'Guns and Schools Don't Mix.'" *Newsom.* at 252. But the court refused to apply *Fraser*, choosing to apply *Tinker* instead. *Id.* at 257.

argued to fall within a school's educational mission. Thus, these cases and countless others would be overruled if this Court adopts Petitioner's reading of *Fraser*, and students would be drastically circumscribed at will by school officials.

Ultimately, if the First Amendment means anything at schools, it is that students have the right to disagree with what they are being taught, as long as they do not materially disrupt the school's operations. Anything less, and there would be no need for the First Amendment at all. "If there is any fixed start in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

The Petitioners' view would swallow *Tinker* and make *Hazelwood*'s deferential standard—requiring speech restrictions to be related to a legitimate pedagogical concern—apply to *all* student speech, not just that which is school-sponsored. The end result would be precisely what *Tinker* said the First Amendment could never allow: an "enclave of totalitarianism whereby students are "confined to the expression of those sentiments that are officially approved." 393 U.S. at 511; *see also Guiles*, 461 F.3d at 330.

III. *TINKER* CANNOT BE READ TO ALLOW SCHOOLS TO CENSOR STUDENT SPEECH MERELY BECAUSE IT IS OFFENSIVE.

Tinker held that a high school student's expression of opposition to the Vietnam War could not be censored by school officials because it did not "materially disrupt[ ] classwork or involve[ ] substantial disorder or invasion of the rights of others . . . ." 393 U.S. at 513. Other *amici* in this case have invited this Court to decide this case under the

"invasion of the rights of others" prong, arguing that Frederick's banner "invok[es] the second prong of *Tinker*" because Frederick "recognized that his banner ***might be offensive*** to Christian students."[5] *Amici* base this argument on the Ninth Circuit's opinion in *Harper v. Poway Unified School District*, which held that the second prong in *Tinker* allows school officials to censor any student speech that may be perceived as demeaning or derogatory toward a student's core characteristics such as race, religion, or sexual orientation. 445 F.3d at 1178.

This interpretation cannot be squared with a fair reading of *Tinker*, and is inconsistent with this Court's line of cases holding that offensive speech is exactly what the First Amendment is designed to protect. *See, e.g., Texas v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable"); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (same).

A. There is no right not to be offended.

This Court has *never* carved out from First Amendment protection speech that offends others. Such offence is not a cognizable invasion of third party rights that could justify viewpoint discrimination. In *Barnette*, this Court held that a student's right not to salute the American flag and recite the pledge of allegiance is protected by the Free Speech and Free Exercise Clause of the First Amendment:

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[5] *See* Brief of *Amici Curiae* National School Boards Association, American Association of School Administrators, and National Association of Secondary School Principals in Support of Petitioners, p. 21 (emphasis added).

> The freedom asserted by these appellees ***does not bring them into collision with rights asserted by another individual*** . . . . [T]he refusal of these persons to participate in the ceremony ***does not*** interfere with or ***deny rights of others*** to do so.

319 U.S. at 630 (emphasis added). "Rights of others" refers to other students' First Amendment rights to salute the flag and recite the pledge. It certainly does not refer to the rights of other students not to be offended by any perceived lack of patriotism on the part of the non-participating students.

Reading *Tinker* in light of *Barnette* can only lead to the conclusion that "infringing on the rights of others" does not mean simply offending them with negative, derogatory, or demeaning speech. Otherwise, schools could censor one side of a political or religious debate merely because another student may take offense.

The Third Circuit's opinion in *Saxe* provides a good model for evaluating the scope of students' free speech rights. There, the court struck down a public school district's anti-harassment policy that banned "derogatory remarks, jokes, demeaning comments or behaviors," and "negative name calling and degrading behavior . . . ." 240 F.3d at 202-03.

> Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated characteristics the content of which ***offends someone***. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment ***"negative"*** or ***"derogatory" speech*** about such contentious issues as "racial customs,"

> "religious tradition," "language," "sexual orientation," and "values." Such speech, ***when it does not pose a realistic threat of substantial disruption***, is within a student's First Amendment rights.

Id. at 217 (emphasis added). Yet this is exactly what *amici* are asking for—the power to censor private speech merely because it may be offensive, even if it does not pose a realistic threat of disruption. *Saxe* flatly rejected this argument, noting that although "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear . . . it is certainly not enough that the speech is merely offensive to some listener." *Id.*

B. *Tinker*'s "rights of others" language should be interpreted to apply only to speech that could result in tort liability.

Lower courts have opined that "infringing on the rights of others" means engaging in tortious conduct. *See Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368, 1375 (8th Cir.), *rev'd on other grounds*, 484 U.S. 270 (1988) (schools may only censor speech that "could result in tort liability for the school"); *Slotterback v. Interboro School District*, 766 F.Supp. 280, 289 n.8 (E.D.Pa. 1991).

Tinker's citation to *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), is particularly instructive on this point. In *Blackwell*, the Fifth Circuit rejected the free speech claims of students distributing buttons protesting racism at school. The students actually "accosted other students by pinning the buttons on [other students] even though they did not ask for one." *Id.* at 751. Obviously, students have a right not to be physically accosted

and forced to speak in a way that violates their beliefs. *See, e.g., Barnette*, 319 U.S. at 642.

But they do not have a "right" to be protected from speech that may offend them because it is offensive, derogatory, or demeaning:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09; *accord Davis ex rel. Lashonda D. v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999) (holding that "[d]amages [for harassment under Title IX] are not available for simple acts of teasing and name-calling among [elementary-aged] school children . . . even where these comments target differences in gender"). It would be disconcerting, to say the least, for this Court to hold that speech that is not actionable "harassment" on an elementary school campus may nonetheless be censored on a high school campus because it somehow "invades the rights of others."

No doubt many students who had loved ones fighting in Vietnam felt demeaned and offended by Mary Beth Tinker's speech condemning the war. But this is exactly the type of speech that needs protecting—especially in the high school context:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritarian selection.

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (internal citations, quotations, and editing marks omitted).

Without this protection, those feeling offended or demeaned by another's speech can have it censored—the classic Heckler's Veto. This Court has routinely reject this type of censorship. "Speech cannot be . . . punished or banned, simply because it ***might offend*** a hostile mob." *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 135-36 (1992) (addressing restriction based on adverse listener reaction to, *inter alia*, a demonstration in opposition to Martin Luther King Day) (emphasis added); *see also R.A.V.*, 505 U.S. at 389 ("a State may not prohibit only that commercial advertising that depicts men in a ***demeaning*** fashion") (emphasis added).

Therefore, should this Court choose to address this aspect of *Tinker*, it should only allow schools to censor student speech that could result in tort liability for the school.

CONCLUSION

The freedom of expression is a critical part of a democracy's foundation. And our public schools, above all else, should strive to prepare students to participate and excel in our democratic political system. This includes providing students the opportunity to both hear and articulate

controversial and potentially offensive ideas. As Justice Harlan once observed, "[it is] often true that one man's vulgarity is another's lyric." *Cohen*, 403 U.S. at 24 (Harlan, J., dissenting). Students must learn how to confront such ideas and be given the opportunity to engage in civil debate within the controlled environment of our schools. But, as one prominent constitutional school scholar has noted, "[s]chools cannot teach the importance of the First Amendment and simultaneously not follow it."[6] Thus, this Court should interpret *Fraser* and *Tinker* in a manner that encourages, rather than stifles, these realities.

Respectfully submitted.

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[6] Chemerinsky, Erwin, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 Drake L. Rev. 527, 545 (2000).

No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE, ET AL.,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is a not-for-profit legal and educational organization dedicated to, *inter alia*, the defense of free speech. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici. In particular, Counsel of Record for amicus was Counsel of Record and presented oral argument for respondents (students) in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and for appellees Emily Echols *et al.* (minors) in *FEC v. McConnell*, 540 U.S. 93, 231-32 (2003).

ACLJ attorneys have represented public school students facing the restriction or denial of their free speech rights. The imbalance of age and authority between student and teacher or between student and administrator make the mere assertion of free speech rights daunting for most public school children. Moreover, public schools, like colleges and universities, face a constant temptation to impose a suffocating blanket of political correctness upon the educational atmosphere. *Cf.* Br. of Amici Nat'l School Bds. Ass'n *et al.* at 3, 12, 15, 18, 21-22 (urging this Court to "cut a wider swath" (*id.* at 12) through the First Amendment to give schools the authority to decide what speech content is "offensive" or "hurtful" and to prohibit such messages). Given these circumstances, the vigorous defense of free speech rights in the public schools is a matter of considerable importance. The ACLJ therefore files this brief, not in support of Joseph Frederick's particular stunt, but rather in defense of the larger constitutional principles at stake.

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[1] The parties in this case have consented to the filing of this brief. Blanket grants of consent are on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

SUMMARY OF ARGUMENT

This Court should dismiss the writ as improvidently granted. The factual record for both sides of the dispute suffers notable weaknesses, leaving this Court with arguments based in key respects upon surmises and inferences. Moreover, the relevance of the policies the school district invokes in defense of its censorship of a student's banner is problematic. The applicability of those policies is uncertain and is in any event ultimately a question of state law, one not yet answered by the state courts of Alaska. In short, this is a poor test case for the important constitutional questions at stake. Other, better vehicles exist, including two cases already pending on this Court's docket.

If this Court does reach the merits, it should affirm the validity of petitioner Frederick's free speech claim. (Amicus does not address the distinct question of qualified immunity.) The school district has engaged in blatant viewpoint-based censorship of student speech in a context where an otherwise identical banner from the *opposite* viewpoint (e.g., "Jesus Says 'No Drugs'") would have been permissible. A school's basic educational mission does not confer blanket authorization for viewpoint suppression of student speech.

The United States proposes a narrower exception to the First Amendment, namely, for student advocacy of *illegal* conduct. This exception, however, would be overbroad -- banning even laudable calls for civil disobedience -- and would lack the necessary connection to its purported justification, namely, student immaturity.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED.

This is a poor test case for student free speech. Given the ready availability of other vehicles to address the important issues at stake, this Court should dismiss the present writ as improvidently granted.

A. Factual Sogginess

The case at bar is a far cry from a crisp, sharply delineated presentation of competing claims.

By his own admission, respondent Frederick's "free speech" -- the "Bong Hits 4 Jesus" banner -- was a communicatively meaningless stunt to garner publicity. Opp. at 3; JA 66-67. Petitioners portray the principal's response as an effort to enforce the school's drug policies, but it is far from obvious that these school policies even applied to Frederick's banner in the first place. (If the policies do *not* apply, the only basis the school offers in support of its restriction collapses.)

Policy 5721 clearly does *not* apply. That policy forbids the "distribution on school premises" of "published materials" that "advocate the use by minors of any illegal substance or material." Pet. App. 55a-56a. But Frederick's banner was not "distributed,"[2] the banner did not constitute "published materials,"[3] and the display was off school premises. Hence, this

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[2] "'Distribution' means circulation or dissemination of published material by means of *handing out* free copies, *selling or offering* copies *for sale and accepting donations* for copies. Further, 'distribution' includes *displaying such material in areas of the school* that are generally frequented by students." Policy 5721 (Pet. App. 55a) (emphasis added).

[3] Distribution is defined only to cover "published material." *See supra* note

(continued...)

policy was triply inapplicable.

Policy 5520 (Pet. App. 53a-54a), meanwhile, forbids any "assembly or public expression that . . . advocates the use of substances that are illegal to minors." Whether this policy applies is a closer question. Ultimately this is a matter of state law on which the state courts of Alaska have not spoken in this case. *Cf. Employment Div. v. Smith*, 485 U.S. 660 (1988) (deferring resolution of constitutional question until after state court determines legality under state law). In particular, it is uncertain if Frederick's banner "advocates" anything other than "Turn your TV cameras toward me!" *See* JA 67.

It would be regrettable if the Court were to resolve the important questions of constitutional law at issue here in the context of a jokester's prank, rather than a student's bearing of a serious message (as in *Tinker*). It would likewise be regrettable if the Court decided these important questions on a factual record based in significant respects upon inference (e.g., as to whether the school policies applied and whether respondent Frederick meant to advocate drugs at all).

B. Alternative Vehicles

The recurring question of what limits public schools may place on student speech is indeed worthy of this Court's attention. Dismissal of the present writ, however, would not preclude such review. Already pending on this Court's docket are two other cases on the same topic. *See Harper v. Poway Unified Sch. Dist.*, U.S. No. 06-595; *Marineau v. Guiles*, U.S. No. 06-757. Both of these other cases present students who have

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[3] (...continued)

2. The policy continues: "for purposes of this policy, 'published materials' include any written or printed cards, letters, circulars, books, pamphlets, notices, newspapers, and similar materials, in addition to materials that are distributed through the electronic media . . . ." Policy 5721(Pet. App. 55a).

serious messages to communicate -- one against homosexuality (*Harper*), and one against President Bush (*Marineau*). Moreover, the students' messages point toward opposite ends of the political spectrum. Hence, taking both of these cases together would help to wash out political considerations and focus the parties, the amici, and the Court on gleaning the proper constitutional rule for *all* student speakers, whether conservative, liberal, or neither.

Meanwhile, other restrictions on student speech, raising similar constitutional issues, arise with disturbing regularity. *See, e.g.*, "Pro-life students sue schools over censorship," WorldNetDaily (Jan. 5, 2007) available at www.worldnetdaily.com/news/article.asp?ARTICLE_ID=53643) (listing four recent incidents).

* * *

Therefore, this Court should consider dismissing the writ in this case as improvidently granted.

II. IF THIS COURT REACHES THE MERITS, THE JUDGMENT SHOULD BE AFFIRMED.[4]

"Minors enjoy the protection of the First Amendment." *McConnell v. FEC*, 540 U.S. 93, 231 (2003) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511-13 (1969)). The proper remedy for dealing with respondent Frederick's "absurd and immature antic," *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting), would have been for school officials to advise his parents, who could have addressed the matter as they saw fit. Furthermore, schools can certainly deal with a student's defiance or insubordination wholly apart from any restriction on the content of student

[4] This brief does not address the question whether petitioner Morse should enjoy qualified immunity from damages.

messages. The school district in this case, however, chose the more drastic route of direct censorship.

Importantly, petitioners have identified no content-neutral time, place, or manner regulations that Frederick's banner violated. As far as the record reflects, students were *allowed* to display banners while watching the Olympic torch parade. The school could have limited the size of banners, restricted their placement to minimize the obstruction of the ability of others to see the parade, or perhaps even have proscribed all hand-held signs or banners. But the school did not do any of these things, and the school offers no such content-neutral defense of its action. Nor does the school proffer a *procedural* regulation, such as a requirement of prior notice to school officials of any intended display, as the basis for punishing Frederick's speech. Nor does the school even propose that Frederick violated a *topical* (but viewpoint neutral) restriction, such as one limiting students' messages on signs on the basis of germaneness to the Olympic torch parade, or barring content beyond the identification of the school or the student group (such as the school band) bearing the sign or banner. Such alternatives would have raised "no realistic possibility that official suppression of ideas is afoot." *RAV v. City of St. Paul*, 505 U.S. 377, 390 (1992).

Instead, the school has chosen to pursue *viewpoint*-based censorship as a means of achieving a *viewpoint*-based objective. *E.g.*, Pet. Br. at 16 ("policy proscribing pro-illegal drug messages"), 28 ("Messages promoting illegal substances are not to be tolerated" . . . "prohibitions on pro-drug messages"), 30 ("restrict student speech . . . viewed as promoting or advocating [drugs]"), 35 (Frederick "not at liberty to praise . . . the drug culture") 39 ("pro-marijuana banner"), 40 ("anti-drug message policy"). To all appearances, an *anti*-drug banner (e.g., "WWJD? Say No to Drugs") would have been permissible.

Hence, the petitioner school district's constitutional defense rises or falls entirely upon its ability to justify its raw viewpoint suppression.[5]

A. Petitioners Fail to Justify Their Viewpoint Censorship.

The presumed viewpoint in question -- in favor of marijuana use -- is one the school may certainly oppose with its own message. But opposition is one thing; censorship is quite another. Here, petitioners have failed to justify the censorship of Frederick's viewpoint.

Even in a nonpublic forum, public schools must act in a reasonable and viewpoint-neutral manner when regulating student speech. *Good New Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (government's "restriction must not discriminate against speech on the basis of viewpoint"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (government must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").[6] In the present

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[5] That *schools* may have an obligation to convey an anti-drug message under the Safe and Drug Free Communities Act, Pet. Br. at 7, is no justification for a school forcing a *student* to convey that same message. Students are not official mouthpieces. *Accord Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) (noting that Free Speech Clause protects private speech and that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis").

[6] The rule of *Hazelwood School District. v. Kuhlmeier*, 484 U.S. 260 (1988), regarding school curricula, obviously does not apply here. That Frederick was attending a school event when he displayed his banner no more makes that banner school-sponsored speech than does the fact that the *Tinker* students wore their armbands to class make their armbands school-

(continued...)

case, however, petitioners' own arguments convict them of viewpoint bias -- indeed, that is their sole defense.

While schools certainly have a compelling interest in forbidding illicit drug *use* among students -- and also associated sales, solicitation, and conspiracy -- this case involves (at most) sheer abstract *advocacy*. The First Amendment would be flaccid indeed if a student could not dare to voice a position contrary to that of the school. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

Petitioners invoke the defense of the school's "basic educational mission," Pet. Br. at 20. While that is a worthy goal, *see Hazelwood*, 484 U.S. at 266, it is certainly not a *carte blanche* justification for viewpoint suppression. For example, while a *school-run* Bible Study would flunk review under the Establishment Clause, this does not mean that a school may ban a *student* Bible Study, even in a school-sponsored club, as "inconsistent with its basic educational mission." *See Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *see also Good News Club*, 533 U.S. at 107. And while a school may teach an exclusively pro-evolution science curriculum, this does not mean that a school could suppress the student Bible Club whenever participants question Darwinian theory or advocate a Creationist point of view. In short, mere invocation of a school's "basic educational mission" is not a constitutional trump card that justifies censoring any student speech that runs counter to the official party line (even when the party line is the right position).

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[6] (...continued)
sponsored speech.

B. Amicus United States Also Fails to Justify the School's Viewpoint Censorship.

The United States government offers a more limited -- and, frankly, more plausible -- defense of petitioners' censorship. The government contends that the *advocacy of illegal conduct*, while protected for adults (except when there is incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)), is unprotected for secondary school students. *See* Br. for United States at 7 ("Tinker's armband . . . did not advocate illegal conduct"), 12 ("advocating any illegal behavior . . . is antithetical to the educational mission"); *see also id.* at 16, 21 n.4. This argument has considerable force. Moreover, adoption of this relatively limited rationale would not endanger the freedom of students to utter disagreements with school policies short of advocating lawbreaking. Thus, reversal on this narrower ground would not jeopardize the rights of students challenging the politically correct viewpoint on, say, abortion or homosexuality. Nevertheless, the government's proposal ultimately cannot carry the day in this case.

To be sure, the constitutional rights of students do not always enjoy the same sweep as those of adults. School drug testing, limits on vulgar speech, and procedural due process requirements, for example, can be valid against students when they would be struck down as to adults. *See* Br. for United States at 9 n.1 (listing cases). The government, invoking this line of authority, in effect proposes that this Court adopt another constitutional exception for students, namely, by allowing the proscription of *advocacy of illegal conduct*.

This argument, while not entirely unattractive, on balance falls short. Such an exception is overbroad and bears insufficient relation to the relevant justification, namely, the immaturity of minors.

A ban on the advocacy of illegal conduct would prohibit

much laudable, even heroic, speech. In the civil rights context, there would have been no First Amendment protection for students who urged their black friends *not* to move to the back of the bus, *not* to heed race-based restroom labels, and otherwise *not* to obey racial segregation rules. In the abortion context, there would be no First Amendment protection for pro-life students who urged their classmates or others to "sit in" at abortion facilities or to refuse official directives to provide abortifacients. And on the other side of the political divide, there would likewise be no First Amendment protection for students who urge their fellows to physically restrain, as "clinic defenders," would-be participants in anti-abortion sit-ins or to fire conscientiously objecting pro-life health professionals. In the environmental context, students could not advocate civil disobedience against whale hunters (on one hand) or defiance of seemingly inane land use regulations (on the other).

Examples could be multiplied, but the point should be clear: the advocacy of illegal conduct is *not* a *malum in se*. A blanket exclusion of such advocacy from the right to free speech would be overly broad, regardless of the obnoxiousness of some particular instances of advocacy speech.

Moreover, a proscription of such advocacy would not bear the sort of relationship to *immaturity* that has warranted other constitutional exceptions for students.

The immaturity of a minor's psychosexual development certainly warrants a greater shielding of students from vulgarity, as in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).[7] The physical and emotional vulnerability of youth

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[7] Ironically, schools themselves can be the worst offenders in terms of bombarding students with vulgarity. *See, e.g., Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996).

similarly can justify more intrusive measures to detect and halt drug abuse. *See* Br. for United States at 9 n.1 (citing cases).

But no such weighty concerns warrant shielding students (or, as in this case, the general public) from a student's[8] advocacy of illegal conduct. To the contrary, students are taught -- presumably with a positive gloss -- about precisely such advocacy and even illegal conduct itself, for example when they learn of the American War of Independence, the Underground Railroad (and the abolition movement in general), the Woman's Suffrage movement, the civil rights movement, and so forth. Surely, there is no strong need to shelter youths from the concept that others may vocally and urgently call for the defiance of certain laws.

Hence, the exception the government proposes, while less restrictive of free speech than a blanket authorization of viewpoint restrictions, nevertheless cannot save the school's censorship in this case.

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[8] Of course, the school itself, as a governmental body, should not be in the business of advocating illegality.

CONCLUSION

This Court should dismiss the writ as improvidently granted or, in the alternative, affirm the judgment below.

Respectfully submitted,

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February 20, 2007

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No. 06-278

In The
Supreme Court of the United States

DEBORAH MORSE;
JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON BEHALF OF STUDENTS FOR SENSIBLE DRUG POLICY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF ON BEHALF OF STUDENTS FOR SENSIBLE DRUG POLICY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Students for Sensible Drug Policy respectfully submits this brief as *amicus curiae* in support of Respondent.

INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[1]

Students for Sensible Drug Policy ("SSDP") is a non-profit, public interest advocacy organization comprising a grassroots network of students who are concerned about the impact drug abuse has on our communities and who believe that our current drug policies are failing young people. Founded in 1998, SSDP has thousands of student members in chapters at over 100 colleges and high schools throughout North America. SSDP helps empower young people to participate in the political process, educates young people about drug policy issues, and advocates for policies that treat drug abuse as a public health issue, not just a criminal justice issue. SSDP believes that protecting the rights of students to freely discuss drug policy and drug abuse issues, particularly in an academic setting, is essential to finding solutions to the problem of drug abuse.

All students – not just SSDP's members – should be able to freely and openly discuss drug policy and drug abuse issues on their campuses. But the Draconian legal standard Petitioners propose would allow school officials to punish student speech concerning a wide range of legitimate policy questions, from medicinal marijuana initiatives to student drug testing. SSDP files this brief to highlight the important perspective students bring to the drug policy debate and to demonstrate the harmful impact

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[1] Pursuant to Rule 37.6, *amicus curiae* Students for Sensible Drug Policy states that no counsel for a party authored this brief in whole or in part. No person or entity other than Students for Sensible Drug Policy or its counsel made a monetary contribution to the preparation or submission of the brief.

that reversal of the decision below would have on students' ability to discuss important drug policy and drug abuse issues.

SUMMARY OF ARGUMENT

Our nation's drug policies directly and intimately affect students' daily lives. Whether it be random drug testing for student athletes or federal financial aid conditioned on lack of any drug conviction, young people are significantly affected in their positions as students by drug-related policies. Students thus have a vested interest in understanding and discussing the underlying issues that guide and affect this country's drug policies. The First Amendment guarantees that their voice on these issues be protected.

Petitioners ask this Court to give school administrators a sizable net to cast over and suppress student speech about drug policy. Yet, such broad powers would not help solve the intractable problem of drug abuse. Indeed, the opposite is true: this country would not be able to evaluate the success of its drug policies without allowing the people most directly affected by those policies to freely discuss and debate them without fear of reprisal. The far-reaching authority sought by Petitioners would prevent students from engaging in legitimate political dialogue relating to heavily debated political issues.

Moreover, allowing school administrators to punish students based only on a subjective view that the speech is "inconsistent" with a school's mission statement would have a similar effect. Under the proposed standard, for example, a student would not be able to freely discuss any drug testing policy adopted at his or her own school for fear that a critical comment could result in punishment for allegedly undermining the school's anti-drug mission.

Petitioners' proposed drug exception to student speech is not, and should not be, the law. Students should enjoy the same First Amendment right to freely speak about issues of drug policy and drug abuse as they have to speak about any other political or public health issue. If

anything, student speech about issues that directly and intimately affect them – like drug policy – is deserving of even more rigid protection. Schools should be allowed to punish student speech only if it seriously disrupts the educational environment or clearly and unambiguously encourages illegal activity.

Contrary to *amici* D.A.R.E.'s assertions,[2] policy considerations do not justify silencing students on the important issues of drug policy and drug abuse by treating speech that mentions drugs differently from other speech. D.A.R.E. claims that the Ninth Circuit's decision would "threaten to make vital anti-drug policies unenforceable." But the studies they cite do not support this claim. Rather, government reviews have shown that two of these purportedly "vital policies" – the National Youth Anti-Drug Media Campaign and the D.A.R.E. program itself – are ineffective at reducing drug use among minors.

Permitting a school to punish the speech at issue in this case would impede, if not extinguish, legitimate debate about drug policy in public schools. Respondent's ambiguous and nonsensical statement could be interpreted as an attempt at a sarcastic political commentary about religion just as easily as – or perhaps even more easily than – it could be interpreted, as Petitioners would have it, as an endorsement of illegal drug use. It could equally be viewed as an attempt to obtain the spotlight during a highly-publicized event, as Respondent testified. Yet, Petitioners did not punish Respondent because they believed his banner was disruptive, but because they did not like the banner's content. If schools can punish this sort of vague and ambiguous speech because it may be interpreted by some as referring to a controlled substance

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[2] Brief for D.A.R.E. America, Drug Free America Foundation, Inc., National Families in Action, Save Our Society from Drugs, Hon. William J. Bennett, and General Barry R. McCaffrey as *Amici Curiae* in Support of Petitioners, filed Jan. 16, 2007 ("D.A.R.E. *Amici* Br."). The parties to the D.A.R.E. *Amici* Brief are collectively referred to as "D.A.R.E." or "*amici* D.A.R.E."

in a positive light, it will unconstitutionally chill student speech about drug policy issues.

ARGUMENT

I. STUDENTS HAVE A CONSTITUTIONAL RIGHT TO DISCUSS ISSUES RELATING TO DRUG POLICIES, ESPECIALLY BECAUSE DRUG POLICIES DIRECTLY AFFECT THEIR DAILY LIVES AND THUS RELATE TO SOME OF THEIR CORE POLITICAL CONCERNS.

A. Drug Policies Affect Students From Elementary School Through College.

The government's war on drugs has a more direct and intimate effect on students' daily lives than perhaps any other national policy issue. Petitioners and their *amici* are naïve to believe that they can shield students from a national conversation that takes place in both our schools and our homes.

During a school day, the average student is affected by a wide range of drug policies. Beginning in elementary school, children in 80% of all public school districts are taught about controlled substances through the strict, zero-tolerance approach of the D.A.R.E. program.[3] As *amici* D.A.R.E. observe, preventing drug abuse is "embodied in concrete policies in place at most schools and in federal anti-drug and educational funding laws that shape school curricula." D.A.R.E. *Amici* Br. at 21. Nearly one quarter of high school students are given drug tests in their schools[4] – in fact, annual federal funding for student

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[3] Marjorie E. Kanof, et al., *Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs*, U.S. General Accounting Office Report, Jan. 15, 2003, at 4, *available at* http://www.gao.gov/new.items/d03172r.pdf.

[4] Ryoko Yamaguchi, et al., *Drug Testing in Schools: Policies, Practices, and Association with Student Drug Use*, Youth, Education & Society Occasional Paper 2, Inst. for Social Research, Univ. of Mich.,

(Continued on following page)

drug testing has increased five times since 2004, from approximately $2 million to $10 million.[5] Students are inundated with millions of dollars worth of government advertising about drugs each year – over $1 billion total since 1998.[6] After graduation, students who have suffered from drug abuse problems and hope to turn their lives around by going to college may be denied federal financial aid if they are convicted of a controlled substance offense. 20 U.S.C. § 1091(r) (2006).[7]

Some schools go beyond these common measures and employ more severe tactics, which they claim are geared towards drug prevention. In Goose Creek, South Carolina, for example, armed police officers stormed a public high school shortly before the start of the school day and, at gunpoint, ordered the students to the floor in order to conduct a drug search.[8] The principal requested the raid based on suspicions cast by a few students and teachers, and some surveillance videos showing nothing more than "students congregating under cameras, periodically walking into a bathroom with different students and

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2003, at 24, *available at* http://www.rwjf.org/files/research/YESOccPaper2.pdf.

[5] *School-Based Drug Testing Programs, Findings Status*, U.S. Dep't of Educ., 2006, *available at* http://www.ed.gov/programs/drugtesting/funding.html.

[6] *Making Further Continuing Appropriations for the Fiscal Year 2003 and Other Purposes*, Conference Report to H.J. Res. 2, 108th Cong., Feb. 13, 2003, at 1345, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr010.108.pdf.

[7] *See also* Katie Heinz, *Study: Drug Use Can Hurt College Financial Aid*, Waterloo/Cedar Falls Courier, May 1, 2006, *available at* http://www.wcfcourier.com/articles/2006/05/01/news/metro/c6d6ac7a21a1838686257161004dce0a.txt (reporting that nearly 200,000 students have been denied federal financial aid because of a drug conviction since the 2000-2001 school year).

[8] Mark Sage, *Armed Police Storm School in Drugs Raid*, The Press Ass'n, Nov. 7, 2003, at Home News.

coming out moments later."[9] Despite a thorough search involving drug-sniffing dogs, no drugs were found.[10] Similarly, zero-tolerance policies have led to severe punishment for trivial and even mythical offenses. Schools have suspended students or turned them over to police for possessing ordinary items that school officials said looked like or "imitated" drugs, such as a bag of dirt that officials said looked like marijuana[11] or a mixture of sugar and Kool-Aid that officials said "imitat[ed] drug activity."[12]

Students are also deeply affected by drug policies outside of school. Mandatory minimum drug sentencing laws, for example, have a significant impact on the children of offenders who are forced to grow up without one or both parents. Indeed, 67% of incarcerated parents – and 74% of incarcerated mothers – at the federal level are in prison due to a drug offense.[13] Young people similarly are affected by a provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which subjects persons convicted of a state or federal felony drug offense to a lifetime ban on receiving cash assistance and food stamps. Some students may become homeless when

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[9] Seanna Adcox, *Police Fail to Find Drugs in Stratford High Raid*, The Post and Courier, Nov. 7, 2003, at 1B.

[10] *Id.*

[11] Tony Hensley, *First Grader Punished for Bag of Dirt*, Heartland News (KFVS12), *available at* http://www.kfvs12.com/Global/story.asp?S=2919630.

[12] Tim Grant, *Pupils Trading Sweet Mix Get Sour Shot of Discipline*, Pittsburgh Post-Gazette, May 18, 2006, at B1; *see also, e.g.*, Justina Wang, *Schoolboy Charged with Felony for Carrying Powdered Sugar*, Chicago Sun Times, Feb. 11, 2006, at 29.

[13] Christopher J. Mumola, *Incarcerated Parents and Their Children*, U.S. Dep't of Justice, Office of Justice Programs, Aug. 2000, at 6, http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf; *see also* Shimica Gaskins, Note: *"Women of Circumstance" – The Effects of Mandatory Minimum Drug Sentencing on Women Minimally Involved in Drug Crimes*, 41 Am. Crim. L. Rev. 1533, 1550 (2004) ("In the end, the harsh consequences of mandatory minimums are mostly felt by the children [of incarcerated mothers.]").

family members run afoul of this one-strike policy that permits public housing agencies to evict entire families if one member of the family engages in drug activity. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002) (holding that the statute gives "local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity").

B. Students Are Often A Focal Point Of The National Drug Policy Debate.

In addition to policies that directly affect students, young people regularly find themselves at the center of the drug policy debate as the principal justification for executive and legislative action. President Reagan, for example, famously declared a "war on drugs" with the chief goal to protect young people from the dangers of drug abuse.[14] All three subsequent presidential administrations have similarly emphasized protecting young people as a central focus of their overall controlled substance strategies.[15] And members of Congress have advanced a

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[14] *See, e.g.*, *Transcript of President's State of the Union Message to the Nation*, The New York Times, Jan. 26, 1983, at A14 ("This Administration hereby declares an all-out war on bigtime organized crime and the drug racketeers who are poisoning our young people.").

[15] *See, e.g.*, Leon Harris and Daryn Kagan, *President Bush Nominates John Walters as Drug Policy Director*, Cable News Network (CNN), May 10, 2001, at Domestic (Transcript No. 01051001v54) (John Walters began his address after being nominated for the position of Drug Policy Director by stating, "[w]e will especially protect our children from drug use."); *Transcript of Presidential Radio Address to the Nation*, U.S. Newswire, Dec. 20, 1997 (President Clinton discussed his administration's "efforts to protect our children from drugs – the most dangerous enemy of childhood."); *Text of President's Speech on National Drug Control Strategy*, The New York Times, Sept. 6, 1989, at B6 (stating that the war on drugs must be won because "too many young lives are at stake").

wide range of specific drug policy measures, from the controversial mandatory minimum sentencing laws[16] to a law that subjects business owners of concert venues to criminal penalties based on drug violations by their patrons,[17] all in the name of young people. Moreover, Petitioners' *amicus* General Barry R. McCaffrey, as director of the Office of National Drug Control Policy ("ONDCP"), argued against state medicinal marijuana initiatives because he believed they "threaten[ed] to undermine efforts to protect our children from dangerous psychoactive drugs."[18]

C. Because Students Often Are At The Center Of Government Efforts To Prevent Drug Abuse, Their Constitutionally Protected Right Of Speech Is Of Particular Importance On Issues Relating To Drug Policy.

Because students have been thrust into the center of our nation's drug policy debate, their constitutional right to participate in that debate should be embraced and protected, not stifled. Students have a constitutionally protected interest in being able to freely share their views on drug policy issues. And those who are substantively involved in making drug policy should seek out these student views. After all, how can we accurately evaluate

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[16] Senator Orrin Hatch, ranking Republican Member of the Judiciary Committee, explained that "the reason why we went to mandatory minimums is because of these soft-on-crime judges . . . who just will not get tough on crime, get tough especially on pushers of drugs that are killing our youth." *Transcript*, PBS Frontline, Jan. 12, 1999, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/script.html.

[17] Nick Anderson, *Rave Crackdown Targets Drugs, Not Music, Biden Says*, The Los Angeles Times, April 17, 2003, at Part 1, 22 (Senator Biden, the sponsor of the measure, said he was "only trying to deter illicit drug use and protect kids.").

[18] *Prepared Statement of General Barry R. McCaffrey, Director of National Drug Control Policy, Before the Senate Judiciary Committee*, Federal News Service, Dec. 2, 1996.

the success of our drug policies without allowing the people most directly affected to freely discuss and debate them? If anything, student speech about drug policy is deserving of even more careful and robust protection than other student speech because of the unique perspective and insights young people have on these national issues and because of the impact these policies have on them. As the 1990 National Commission on Drug-Free Schools explained: "[b]ecause any effort to eliminate drug problems must have the cooperation and support of young people, and because drugs have had such a significant impact on them, the Commission has given students' views much consideration in its findings and recommendations."[19] *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) ("The government's approach to th[e] problem [of drug abuse] is . . . a matter of great importance [and] criticism of the federal government's national drug control policy – even to the extent of advocating the legalization of certain drugs – implicates matters of public concern.").

D. Student Speech Relating To Drug Policy Should Be Protected Because Students Offer An Invaluable Perspective Regarding How To Curb Drug Abuse.

Students often experience disproportionate pain in seeing family members, friends, and classmates suffer from drug abuse. Accordingly, students – as much as other groups – appreciate the need for policies that will reduce

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[19] *Toward a Drug-Free Generation: A Nation's Responsibility, Final Report*, Nat'l Comm'n on Drug-Free Schools, U.S. Dep't of Educ., Sept. 1990, at 13.

the harmful impact that drug abuse and addiction have on our communities. As is true among the general public, however, there is disagreement among students about the best way to address the drug abuse problem and the effectiveness of our current approach. Drug abuse has remained an intractable problem – as *amici* D.A.R.E. correctly observe – *despite* the fact that we have spent over $78 billion for federal drug enforcement efforts since 2000 alone[20] and, as of 2003, over 325,000 people were incarcerated in state or federal prisons for drug offenses.[21]

Many students believe that the very real harms of drug abuse are not adequately addressed by current policies and that a new approach is needed. Students with this viewpoint should not be subjected to, nor should they fear, punishment by school officials for expressing their opinions about drug policy, particularly in an academic setting. *Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673, 675 (9th Cir. 1971) (Students have the "right to freely express themselves upon those issues which concern them.").

Indeed, SSDP has found that encouraging among young people a free and open dialogue about drug policy not only is an essential part of a healthy and legitimate debate about the policies themselves, but also promotes a broader civic engagement among students. Last spring, for example, members of the Chicago-based Francis W. Parker High School chapter of Students for Sensible Drug Policy organized a trip to a national summit on student drug testing in Wisconsin.[22] And in 2004, because of her active

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[20] *National Drug Control Strategy: FY 2007 Budget Summary*, The White House, 2006, at 9, http://www.whitehousedrugpolicy.gov/publications/policy/07budget/budget07.pdf.

[21] Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, U.S. Dep't of Justice, Bureau of Justice Statistics, Nov. 2006, at 9-10, http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

[22] *See* Jamaal Abdul-Alim, *Official Touts School Drug Tests: But Local Critics Call Random Screenings Costly, Ineffective*, The Milwaukee Journal Sentinel, April 26, 2006, at B3 ("Marissa Venturi . . . a member of Students for Sensible Drug Policy . . . called random

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work on the issue in her school, Amanda Gelender – a public high school student and SSDP member – testified before the California state senate during hearings on a drug-testing bill.[23]

Whatever one thinks about the merits of these students' views on drug testing, their engagement provides an invaluable contribution to the drug policy discussion, as well as to the educational process. By joining the public discussion about issues that affect them, students have the opportunity to experience in the real world the lessons about which they read in high school civics classes – experiences that may very well keep them interested and involved in our country's democratic process. *See Shanley v. N.E. Indep. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 972 (5th Cir. 1972) ("One of the great concerns of our time is that our young people, disillusioned by our political processes, are disengaging from political participation.").

II. PUBLIC SCHOOL ADMINISTRATORS SHOULD NOT BE PERMITTED TO RESTRICT STUDENT SPEECH RELATING TO DRUG POLICY SIMPLY BECAUSE THEY HAVE A DIFFERENT VIEWPOINT.

Petitioners contend that school administrators should have the authority to restrict and punish any student speech that an administrator might "reasonably glean[]

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drug testing 'degrading' and said it would make her reluctant to participate in extracurricular activities[.]").

[23] *See* Chris DeBenedetti, *Student Addresses Legislators*, The Oakland Tribune, April 20, 2004, at More Local News ("'I'll always vividly remember it,' Gelender said of her testimony. 'It's so rare to have a high school student testify in front of the state [Legislature]. Just being in Sacramento and in the Capitol Building was really, really exciting.'"); *see also* Zach Wierzenski, *Student Drug Testing Is Not the Answer*, The Virginian-Pilot, July 2, 2005, at B9 (editorial by an SSDP high school member who organized a coalition of parents and other students in opposition to a county drug-testing initiative).

. . . expresse[s] a positive sentiment about" a controlled substance. Brief for Petitioners, filed Jan. 16, 2007 ("Pet'r's Br.") at 25. But the authority they seek has virtually no limit and would allow school officials to punish students for engaging in undeniably political speech that may conflict with the views or opinions of the school administrators. This subjective standard would plainly lead to the divergent treatment of identical speech, and the overbroad prohibition of core political speech.

A. The Medicinal Marijuana Debate Exemplifies The Fatal Flaws In Petitioners' Proposed Standard.

During the past decade, perhaps the most prominent and hotly-debated drug policy issue has been the question whether seriously ill patients should be permitted to use marijuana for medicinal purposes. This scientific and political debate provides a clear picture of why Petitioners' proposed standard cannot stand constitutional muster. Since California passed its medicinal marijuana initiative in 1996, this Court has heard two medicinal marijuana-related cases, and at least ten states have passed laws similar to California's.[24] Students have as much interest in discussing these initiatives and court cases as anyone else, especially where, for example, they have a family member with cancer. Based on medical studies, these students may believe that marijuana provides an effective treatment for their family member's health condition. And having an opportunity to discuss the policy issues with friends and classmates in a

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[24] *See Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001); Alaska Stat. Ann. §§ 11.71.090, 17.37.010 to 17.37.080 (2007); Colo. Const. art. XVIII, § 14; Colo. Rev. Stat. § 18-18-406.3 (2006); Haw. Rev. Stat. Ann. §§ 329-121 to 329-128 (2006); Me. Rev. Stat. Ann. tit. 22, § 2383-B5 (2006); Mont. Code Ann. §§ 50-46-102 to 207 (2006); Nev. Const. art. IV, § 38; Or. Rev. Stat. §§ 475.300 to 475.346 (2006); R.I. Gen. Laws §§ 21-28.6-1 to .6-11 (2007); Vt. Stat. Ann. tit. 18, § 4471 (2006); Wash. Rev. Code §§ 69.51A.005 to 69.51A.902 (2007).

constructive environment, such as at school, may help them cope with the internal turmoil they encounter when dealing with an ill loved one.

Yet, Petitioners' proposed approach would permit administrators to punish any and all student speech that relates to the medicinal marijuana debate. Speech supporting medicinal marijuana laws or initiatives, almost by definition, "expresse[s] a positive sentiment about marijuana use" – namely, that marijuana use may sustain the health of individuals who suffer from cancer, AIDS, multiple sclerosis, or other debilitating illnesses. Leading up to the 2006 elections, for example, a public high school in South Dakota confiscated T-shirts in support of a South Dakota medicinal marijuana ballot initiative from two students for this very reason.[25] The shirts featured the message "Vote Yes on Initiated Measure 4" along with an image of a marijuana leaf. *Id.* The principal claimed that the inclusion of the leaf on the shirt violated school policy. One of the students contended that the picture on the shirt "should be protected as political speech" and argued that "he was campaigning for a ballot issue, not promoting the use of an illegal drug." *Id.* The principal responded that that was "absurd, . . . I'm not even going to dignify that argument with a response." *Id.* Although the principal there said that he would permit the wording on the shirt without the offending image, Petitioners' proposal in this case would not make even that concession: any speech that might be interpreted by a school administrator as expressing a positive sentiment about marijuana use could be banned from public schools.

The impact of Petitioners' approach would not be limited to statements in favor of medicinal marijuana initiatives. Petitioners claim that school administrators should be able to punish any student speech that an administrator might "reasonably glean" expresses a

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[25] *See S.D. School Confiscates Teens' Medical Marijuana T-Shirts*, The Associated Press, Nov. 11, 2006.

positive sentiment about a controlled substance. Pet'r's Br. at 25. That authority would encompass nearly any speech that relates to drug abuse or drug policy. *Id.* at 25 (arguing that such statements are "directly contrary to the school's basic educational mission of promoting a healthy, drug-free lifestyle").

It is not uncommon for government officials and advocates of zero-tolerance policies to mischaracterize legitimate policy arguments as attempts to encourage or promote drug use. For example, in 2004, SSDP submitted an FOIA request and accompanying fee waiver application for statistical information about the number of students who had been denied financial aid due to a drug conviction. On September 20, 2005, the Department of Education denied the fee waiver, stating that it cannot "conclude . . . that SSDP has no commercial interest in the disclosure sought" because SSDP's "campaign could directly benefit those who would profit from the deregulation or legalization of drugs . . . ."[26] On January 26, 2006, SSDP filed a lawsuit against the Department of Education, which the Department quickly settled prior to responding to the Complaint by agreeing to provide the information sought without charge.[27] Similarly, government officials often argue that reform policies themselves should not be enacted because they would send the "wrong message" to kids and encourage drug use.[28] In

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[26] *Students for Sensible Drug Policy v. United States Dep't of Educ.*, Case No. 1:06-CV-00140-EGS (D.D.C. 2006), Complaint ¶ 17, *available at* http://www.dcd.uscourts.gov/court-records.html.

[27] *Harmful Drug Law Hits Home: How Many College Students in Each State Lost Financial Aid Due to Drug Convictions?*, Students for Sensible Drug Policy, April 17, 2006, at 8, *available at* http://www.ssdp.org/states/ssdp-state-report.pdf.

[28] *See, e.g.*, Elvia Diaz, *Hopefuls Decry Medical Marijuana*, The Arizona Republic, Oct. 10, 2002, at 4B (reporting that U.S. drug czar John Walters said medicinal marijuana initiatives were "sending the wrong message to young people"); Jacob Sullum, *That Chemo Cachet: Medical Marijuana and Kids*, Reason Magazine, Jan. 2006, *available at* http://www.reason.com/news/printer/33056.html/ (reporting that ONDCP

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this atmosphere – where the Department of Education implies SSDP's campaign to repeal a law denying financial aid to students who are trying to recover from drug abuse means the organization is financially entangled with "those who would profit from . . . the legalization of drugs" (*i.e.*, drug dealers) – it is difficult to imagine any drug policy speech that school administrators would not be able to suppress under Petitioners' proposed standard.

B. Petitioners' Proposal Cannot Withstand Constitutional Scrutiny, As Evidenced By Past Cases.

The recent Second Circuit case *Guiles v. Marineau* provides an especially instructive example of how Petitioners' "reasonably glean" approach would allow a school official to punish legitimate political speech simply for containing an ambiguous reference to a controlled substance. *See Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006). There, a student wore a T-shirt criticizing President Bush. It read "George W. Bush, Chicken-Hawk-in-Chief" and featured an image of President Bush's face along with various other images, including three lines of cocaine and a martini glass. *Id.* at 322. School officials claimed the shirt violated its dress policy based on "the images of the drugs and alcohol and the word 'cocaine . . . . '" *Id.* at 323. The district court held for the school district, finding that the images were "plainly offensive or inappropriate," but the Second Circuit reversed. Petitioners criticized *Guiles* in their reply memorandum in support of their *certiorari* petition, asserting that *Guiles* "adopt[ed] the Ninth Circuit's destabilizing approach." Petitioner's Reply Memorandum, filed Oct. 9, 2006, at 5. Tellingly, their opening merits brief was nearly silent on *Guiles*. Indeed, far from demonstrating fault in the Ninth Circuit's decision, *Guiles* reveals the dangerousness of the

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said the California medicinal marijuana initiative sent "the wrong message to our children").

approach Petitioners advance. Petitioners' standard would create a drug exception to student speech whereby a student could be punished for any ambiguous image of, or reference to, a controlled substance, even an image or reference that is unquestionably political and possibly "anti-drug." *See Guiles*, 461 F.3d at 329 (finding that the students' shirt appeared to relate an anti-drug message).[29]

Granting school administrators the power to punish students anytime their speech could possibly be interpreted as expressing a positive sentiment about a controlled substance would mean that a policy area intimately affecting them would be off-limits to free debate. Under Petitioners' view, the more an issue impacts students, the less the Constitution protects a student's right to freely speak about it. This is not, and should not be, the law, particularly in light of the significant interests students have in discussing and debating approaches to solving the problem of drug abuse. *See supra* at 4-11; *see also Tinker*, 393 U.S. at 511 ("[S]tudents may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to

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[29] Petitioners' *amicus* the United States argues that a school should be allowed to suppress a banner like Mr. Frederick's "even if [it] were somehow understood to advocate legalization of marijuana[.]" Brief for United States as *Amicus Curiae* Supporting Petitioners, filed Jan. 16, 2007, at 27. Yet, whether marijuana should or should not be legalized is a political question that should be as open to legitimate debate among students as any other political issue. *See Shanley*, 462 F.2d at 972 (noting that "the general subject[] of marijuana [is a] . . . widely-publicized, widely-discussed, and significant issue"). This is especially true in Alaska, where, as the court below noted, Alaska court decisions and "repeated referenda about whether, and to what extent, to criminalize or legalize marijuana" make the issue of marijuana legalization particularly salient. *Frederick v. Morse*, 439 F.3d 1114, 1118 n.4 (9th Cir. 2006); *see also id.* at 1122 n.44 ("By [Petitioners'] standard, distributing photocopies of the Alaska Supreme Court decision [that] declared that there is 'no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of marijuana,' would also undermine the school's anti-drug mission.").

the expression of those sentiments that are officially approved."). This Court should not accept Petitioners' invitation to create a drug exception to students' First Amendment rights. *See Hatter*, 452 F.2d at 675 (courts should not "distinguish between issues and . . . select for constitutional protection only those which [they] feel[] are of sufficient social importance").

C. Petitioners' Proposed Approach Would Prevent Students From Freely Discussing Their Own School's Drug Policies.

Petitioners contend that schools should be able to prohibit student speech about drugs or drug policy that – in their view – is "inconsistent with the mission of schools to promote healthy lifestyles (including seeking at every turn to combat substance abuse)." Pet'r's Br. at 28. Such authority would permit school officials to punish a wide range of political speech. *See Frederick*, 439 F.3d at 1120 ("All sorts of missions are undermined by legitimate and protected speech . . . a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing that [there is] less heart disease among moderate drinkers and teetotalers . . . .").

If a school can punish students for speech that is inconsistent with the school's mission or policies, students will not be able to openly discuss their own school's drug-testing policies, even if that discussion could benefit the effectiveness of the program. Student drug testing at schools is another heavily-debated drug policy issue in this country and has been the subject of two cases before this Court in the last twelve years. *See Bd. of Educ. of Indep. Sch. Dist. No. 9 v. Earls*, 536 U.S. 822 (2002) (holding that suspicionless drug testing of students who participate in extracurricular activities is constitutional); *Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding that student athletes had a decreased expectation of privacy and that suspicionless drug testing of such students is constitutional). The issue has become even more prominent following President Bush's 2004 State of the

Union Address, in which he highlighted random student drug testing as a key part of his national drug control strategy.[30] The Office of National Drug Control Policy has held drug-testing summits in cities across the country to promote student drug testing and to "engage local communities in a productive dialogue about the dangers of youth substance use and the efficacy of developing and implementing random student drug-testing programs."[31]

Petitioners' proposal also could result in school administrators' preventing students from forming clubs or groups that provide a forum to discuss drug policy issues. Indeed, at least one school has already attempted to rely on this rationale to stop the formation of an SSDP chapter. In autumn 2006, Devon Defazio, a high school junior at a public school in Clearwater, Florida, attempted to start an SSDP chapter because of his interest in the student drug-testing issue. The school's principal, however, refused to approve the chapter, contending it would be inconsistent with the school's zero-tolerance drug policies. The principal took this position despite the fact that one of SSDP's primary concerns is the adverse impact that drug abuse has on our communities.[32] After months of discussion, including repeated phone calls and emails from SSDP's Executive Director to the principal assuring him that SSDP does not endorse drug use, the principal finally relented and allowed Mr. Defazio to start his group. If Petitioners' broad standard is adopted, however, high school principals

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[30] *See* Jim Wrinn, *Catawba Ponders Student Drug Test: County Schools Battle Teen Use, Officials Have Many Questions, Are Yet to Determine Who Would be Tested and How*, Charlotte Observer, Feb. 8, 2004, at 1V (noting that drug testing had become an issue of "local and national interest since President Bush, in his State of the Union address last month, called on Congress to expand funding for school drug testing from $2 million to $23 million").

[31] *White House Office of National Drug Control Policy to Host Random Student Drug-Testing Summits*, State News Service, Jan. 23, 2007.

[32] *See Mission and Values Statements*, Students for Sensible Drug Policy, http://www.ssdp.org/about/.

seemingly would be free to ban students from forming school clubs or groups to discuss drug policy issues, anytime the principal believes the discussions would be "inconsistent with" the school's anti-drug mission or the policies that implement that mission. School administrators should not be allowed to stifle legitimate student speech with which they personally disagree under the guise of claiming that it is inconsistent with the school's policies. *See Healy v. James*, 408 U.S. 169, 187 (1972) (holding that college president's "mere disagreement . . . with [a student] group's philosophy affords no reason to deny it recognition"); *Shanley*, 462 F.2d at 972 ("Perhaps newer educational theories have become in vogue since our day, but our recollection of the learning process is that the purpose of education is to spread, not to stifle, ideas and views.").

D. Having Broad Authority To Suppress Student Speech Relating To Drug Policy Will Not Help Schools Prevent Drug Abuse.

Amici D.A.R.E. argue that a drug exception to student free speech is warranted because it is necessary to prevent drug abuse. *See* D.A.R.E. *Amici* Br. at 12-17. D.A.R.E. goes so far as to claim that if the Ninth Circuit's ruling is allowed to stand, it would "threaten[] to make vital anti-drug policies unenforceable." *Id.* at 4. Although D.A.R.E. is correct that schools and parents can help reduce student drug abuse by "expos[ing students] to drug or alcohol prevention messages," *see id.* at 11, they offer no evidence to support their striking claim that silencing students on the important issues of drug policy and drug abuse is necessary, or even helpful, to combat the drug abuse problem. In fact, just the opposite is true: open discussion about drug policy and drug abuse gives students the opportunity to learn more about the issues and to make informed decisions.

Nor is there evidence to support D.A.R.E.'s more modest assertion that programs promoting hard-line zero-tolerance messages to students are themselves "vital"

drug policies. Indeed, recent government studies have shown that the two largest such programs fail to reduce drug use among young people. A United States General Accounting Office examination of six long-term studies of the D.A.R.E. program revealed that there were "no significant differences in illegal drug use between students who received DARE . . . and students who did not . . . ."[33] Similarly, a study funded by the National Institute on Drug Abuse found that the federal anti-drug advertising campaign was not effective in reducing drug use among young people. Specifically, the study revealed "little evidence of direct favorable campaign effects on youth" and found that the campaign's effects on "social norms and perceptions of other kids' use of marijuana . . . were consistently in an *unfavorable direction*, i.e., higher exposure [to the campaign] leading to weaker anti-drug norms. [Emphasis added.]"[34]

Ultimately, there is very little support for D.A.R.E.'s claim that suppressing student speech is necessary to enforce vital anti-drug policies. Indeed, the policy arguments advanced by D.A.R.E. do not justify taking the highly unusual step of treating student speech that mentions drugs differently from other student speech under the First Amendment.

III. PUNISHING RESPONDENT'S SPEECH WOULD STIFLE LEGITIMATE STUDENT SPEECH ABOUT DRUG POLICY.

Whether under Petitioners' proposed standard or one that is less restrictive, permitting Petitioners to punish

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[33] Marjorie E. Kanof, et al., *Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs*, U.S. General Accounting Office Report, Jan. 15, 2003, at 2, *available at* http://www.gao.gov/new.items/d03172r.pdf.

[34] Robert Orwin, et al., *Evaluation of the National Youth Anti-Drug Media Campaign: 2004 Report of Findings*, Westat, June 2006, at xv, *available at* http://www.nida.nih.gov/DESPR/Westat/NSPY2004Report/Vol1/Report.pdf.

Respondent based on his vague and nonsensical statement would chill legitimate debate in public schools about drug policy. Respondent's speech neither directly nor even necessarily advocated drug use. Indeed, his uncontroverted testimony is that he did not intend to encourage or support drug use. The most natural understanding of Respondent's statement is exactly what he said it was: a nonsensical absurdity designed to garner attention. *See Frederick*, 439 F.3d at 1116 (noting that Mr. Frederick described the words on the banner as "just nonsense" that was "designed to be meaningless and funny, in order to get on television"). Even viewed in the worst light, it is difficult to discern much more from the phrase "BONG HITS 4 JESUS" than an immature distraction. Indeed, the phrase could more easily be interpreted as an attempt at a sarcastic criticism of religion than as an endorsement of drug use. Respondent's ambiguous phrase is a far cry from student speech that directly "advocates breaking the law[.]" D.A.R.E. *Amici* Br. at 14. Given what Respondent actually said, punishing speech such as his under any standard, in the absence of an actual disruption of school activities or a statement that clearly advocates the use of illegal drugs, would improperly stifle student speech about drug policy.

If school administrators are allowed to punish a nonsensical statement simply because it mentions a controlled substance (or a term associated with a controlled substance) and an administrator claims it is "pro-drug," it will be impossible for students to know what speech falls on what side of the line. Students who want to discuss medicinal marijuana, mandatory minimum drug sentences, random drug testing of student athletes, or other drug policy reform ideas would be in constant fear of punishment, concerned that an administrator might wrongly interpret their speech as being in favor of breaking the law. *Williams v. Spencer*, cited by Petitioners, nicely illustrates the difference between speech that amounts to a direct, unambiguous endorsement of illegal activity, and the phrase on Respondent's banner. *See Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980). In

Williams, the Fourth Circuit held that a school could prohibit distribution of an independent student newspaper that contained a paid advertisement for illegal drug paraphernalia. *Id.* at 1203. In reaching its decision, the court emphasized that the speech at issue was an unambiguous endorsement of drug use and "quite different from . . . a school prohibit[ing] the distribution of a publication containing an article of some literary value that may examine drugs and drug use. The printed material in issue here was paid for by a store seeking to profit from its encouragement of the use of drugs." *Id.* at 1206.

The distinction drawn in *Williams* is important to consider in deciding this case. So long as the student speech at issue may have some literary value or other similar value, such as political commentary, schools should not be permitted to punish that speech simply because it may also be interpreted as expressing a vague and nonsensical positive sentiment about drug use. Punishing students for clear and unambiguous statements that encourage their fellow students to engage in illegal activity does not pose the danger to important political speech that punishing Respondent's speech does, because it would require more than just an administrator's reasonable belief. By contrast, a legal standard that permits schools to punish students for statements that could be reasonably interpreted as political, nonsensical, or pro-drug has no limits. For such speech, *Tinker* provides more than adequate discretion for schools to punish speech that crosses the line from a nonsensical joke or satirical political statement into a material disruption of the educational environment or a clear endorsement of illegal activity. *See Tinker*, 393 U.S. at 513 (holding that schools may punish speech "in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts class work or involves substantial disorder or invasion of the rights of others").

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 06-278

IN THE
SUPREME COURT of the UNITED STATES

DEBORAH MORSE, JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF RESPONDENT

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Sup. Ct. Rule 37.6 1

U.S. Const. amend. I 1, 6, 8, 17, 18

Other Authorities:

A. Datar & R. Sturm, *Childhood Overweight And Elementary School Outcomes*, 30 Int'l J. of Obesity 1449 (2006) (available at http:-//www.nature.com/ijo/journal/v30/n9/pdf-/0803311a.pdf) 10

Carol Torgan, *Childhood Obesity On The Rise*, The NIH Word On Health (June 2002) (available at http://www.nih.gov/news/WordonHealth-/jun2002/childhoodobesity.htm) 10

Oregon School Board Ass'n, *The High Cost of Childhood Obesity* (available at http://www-.osba.org/hotopics/atrisk/obesity/highcost.-htm) 10

Stacey L. Fabros, *A Cry For Health: State And Federal Measures In The Battle Against Childhood Obesity*, 7 J. L. & Fam. Stud, 447 (2005) 10

INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is a public interest law firm. It has participated in the litigation of numerous cases concerning issues related to the First Amendment, especially those involving students in college and high school, including *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002) and *McConnell v. Le Moyne College*, 808 N.Y.S.2d 860 (App. Div. 2006).

CIR believes that the standard set forth by petitioners and their amici on the underlying First Amendment question, *viz.*, speech that interferes with a school's basic educational mission is unprotected by the First Amendment, is far too expansive and vague. It submits this amicus brief to point out the dangers of adopting such a standard.[1]

STATEMENT OF THE CASE

The incident in question took place as the Olympic torch relay passed through Juneau. Students at Juneau High School were let out of class to watch the relay. According to several witnesses, it was left to each individual student's discretion to watch, or not watch, the relay. Students were permitted to remain inside the school, even if the teacher of their scheduled class was outside, and their only obligation was to return to the school for their next class. Joint

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[1] Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

CIR understands that all parties have consented to the filing of amicus briefs on the merits. *See* Sup. Ct. Rule 37.3(a).

Appendix ("J.A.") 36, 38.

When the relay passed, respondent and others unfurled a banner with the words "Bong Hits 4 Jesus" across the street from the school. He was subsequently suspended from school for ten days by the school principal, Deborah Morse, and that suspension was affirmed following an administrative appeal.

Respondent Frederick filed suit in federal district court against Morse and the Juneau School Board (sometimes referred to herein collectively as the "School"). The district court considered various motions for summary judgment from both parties. Petition Appendix ("Pet. App.") 24a. It granted the School's motion for summary judgment on all counts, and denied Frederick's motion for summary judgment. Pet. App. 41a-42a. The district court apparently granted both Morse *and* the school board qualified immunity from damages under Section 1983, although it cited no authority for the proposition that such qualified immunity is even available to entities like school boards. Pet. App. 29a-30a. Indeed, the district court believed that qualified immunity was appropriate for both defendants, even if the viewing of the torch relay was *not* a school sponsored event, so long as Morse believed that Frederick's statement was "directed at students on campus." Pet. App. 30a. *But compare* Pet. App. 35a ("The fact that Frederick was participating in a school-approved event is significant in dictating the degree to which the school could control the content of his speech or his expressive conduct"). The clerk entered final judgment on May 29, 2003, and Frederick appealed.

The Ninth Circuit vacated the district court's judgment dismissing the action, and remanded. The Ninth

Circuit believed that Frederick had not raised a genuine issue of material fact over whether the incident in question took place at a school-sponsored event (Pet. App. 6a), although it placed some importance on the fact that the event took place outside of school at an event that was weakly supervised (Pet. App. 17a & n.45). It held that the case was governed by *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503 (1969), and that defendants' concession that they had no basis for believing that Frederick's speech would be disruptive to the educational process precluded them from punishing or censoring Frederick for it. Pet. App. 6a-7a.

Despite these holdings, however, the Ninth Circuit did *not* reverse the denial of Frederick's motion for summary judgment.[2] Nor did it remand the case with instructions to award him damages. Rather, its judgment only vacated the judgment of the district court dismissing plaintiffs' case, which dismissal had been based on its granting of defendants' various summary judgment motions. In short, the Ninth Circuit did nothing more than vacate the grant of summary judgment to defendants. Pet. App. 22a.

SUMMARY OF ARGUMENT

The School and its amici agree with the now-hoary proposition that students in public schools do not "shed their constitutional rights to freedom of speech or expression at

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[2] Frederick had moved for summary judgment only with respect to his claims for declaratory and injunctive relief. Pet. App. 24a. Since Frederick had graduated Juneau Douglas High School, and was attending Stephen F. Austin State University at the time that the summary judgment motions were being litigated (J.A. 31, ¶ 14), the Ninth Circuit may well have questioned his right to such relief. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

the schoolhouse gate," *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 506 (1969) -- but only because (according to the School) they apparently shed them across the street, before they even get to the schoolhouse gate. The School and its amici perform this feat of legerdemain by taking two previous ideas in this Court's student speech jurisprudence and stretching them where they have never gone before: "basic educational mission" and "school-sponsored activity."

Under the School's version of its "basic educational mission," the term can be defined in any way it likes. Thus, if a school believes that patriotism and/or sexual chastity are important values to inculcate in high school students, any speech deemed inimical to those values can be punished. *Cf.* Brief of Nat'l School Bd. Ass'n, *et al.* ("NSBA Br.") 17 n.19 (patriotism is a widely held value that likely is taught by many schools). Moreover, in its view, a school's determination that speech is inimical to its fundamental values must be given deference. Under this theory, if a school determines that a student's failure to salute the American flag undermines the school's message of loyalty to our country and its values, it can punish the student for his refusal to do so. *Compare West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). After all, a school board can reasonably conclude that exemptions to the general requirement "'might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.'" *Id.* at 636 n.16 (*quoting Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599-600 (1940), *overruled in West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

This broad discretion to punish speech on any matter

a school board deems inimical to its self-defined goals is justified by the School and its amici as needed because (1) we must influence youth to make right choices and (2) a full and open debate about such choices -- or for that matter, any debate at all -- might lead them to make bad choices. CIR believes that they grossly underestimate the intelligence and overestimate the malleability of today's high school student. Those students understand the "depth" of such statements as "Bong Hits 4 Jesus"; they also understand the hypocrisy of those who teach the Bill of Rights only to deny those rights in practice. *Barnette*, 319 U.S. at 637 ("That [school boards] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."); *id.* at 641 ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."); *Tinker v. Des Moines Ind. School Dist.*, 393 U.S. 503, 511 (1969) ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They many not be confined to the expression of those sentiments that are officially approved."); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting) ("If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could . . . convert[] our public schools into 'enclaves of totalitarianism.'") (*quoting Tinker v. Des Moines Ind. School Dist.*, 393 U.S. 503, 511 (1969)).

As for "school-sponsored activity," the other key phrase for the School and its amici, they argue that any and all activity related in any way to a school can be deemed a

"school-sponsored activity," and, thus, an activity during which student speech can be regulated. That, of course, is the only way that the activity in question here can be deemed a "school-sponsored activity," at least if full weight is given (as it should be) to the evidence submitted by Frederick on the School's motions for summary judgment. Even if one does not give full weight to that evidence, it cannot be disputed that the pedagogic nature of the event was rather low, and, accordingly, the school's interest in quelling speech inimical to its goals was similarly low.

No one argues that the School could have punished Frederick for distributing leaflets with the phrase "Bong Hits 4 Jesus" on the same sidewalk after school hours, regardless of how inimical to the school's "basic educational mission" such speech was deemed to be. The speech here was not much, if at all, different in its connection to any pedagogic event at the school. Moreover, there is an issue of fact as to whether this was a "school event" at all. If it was not, the School had no right to interfere with Frederick's exercise of free speech regardless of its effect on the School's "mission."

Ultimately, the School and its amici focus on the scourge of illegal drugs and the need to take drastic action to prevent their spread. *E.g.*, Brief for D.A.R.E. America, *et al.* ("DARE Br.") 5-12. To be sure, there have been many casualties, on both sides, in the war on drugs. The First Amendment need not be among them.

ARGUMENT

I. The School And Its Amici Err In Arguing That Frederick's Speech Was Not Protected By The First Amendment.

The School and its amici are compelled to invest Frederick's flippant speech with great import in order to justify the School's obvious overreaction to it. It was, they say, speech designed to, or with the effect of, promoting illegal drug use, which is contrary to the School's basic educational mission of preventing such use. Even granting them the questionable premise of interpreting Frederick's speech in this way, their argument that the School can punish any speech inconsistent with its "basic educational mission" during any "school-sponsored activity" is not supported by this Court's cases.

1. The School and its amici rely heavily on *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) in arguing that a school may punish speech inconsistent with its "basic educational mission." But *Fraser* hardly stands for the proposition that a school can define its "mission" in any way it chooses. Rather, *Fraser* focusses on the *means* that the student there chose to communicate his point, rather than the substance of it:

> [T]he penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the schools' basic educational mission. A high school assembly or classroom is no place for a sexually explicit

> monologue directed towards an unsuspecting audience of teenage students.

Id. at 685. This Court analogized rules for appropriate means of communication to the rules for the conduct of debates promulgated in each house in Congress. *Id.* at 681-82. This Court never held that there were certain topics that would be off-limits -- or worse, that student expression on certain topics is permissible only if one agrees with the school's own viewpoint. *Kuhlmeier*, 484 U.S. at 287 (Brennan, J., dissenting) (in *Fraser*, in holding that the school board had discretion to determine the propriety of certain speech, "the Court was referring only to the appropriateness of the *manner* in which the message is conveyed, not of the message's *content*") (emphasis in original).

That is a rather large and significant step. It moves the school's *pedagogic* interest from punishing anti-social behavior (speech must comply with rules of decorum in a civilized society) to conformity of opinion (speech must not disagree with the school's own belief system). Perhaps such a step might be justified where the school's message is an actual pedagogic topic. If a student refuses to learn evolution in his high school biology class and answers all questions on an exam related to that topic with "the theory of evolution is contrary to the Bible," a school can give him a failing grade without violating the First Amendment. But the School's pedagogic interest here is far more remote than that. It is concerned that students will take messages like Frederick's seriously, smoke marijuana, and thus be less able to learn.[3]

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[3] The School and its amici also claim that Frederick's message interfered with the "school-sanctioned activity" by "radically changing the (continued...)

The School and its amici do not bother to explain how their "contrary to the basic educational mission" theory is consistent with *Barnette*, where this Court held that a school district could not compel students to salute the flag. The school district's goal in *Barnette* was to inculcate loyalty to our country and its values, and the district reasonably believed that granting exemptions to the requirement that all schoolchildren salute the flag each day would undermine that goal. *Barnette*, 319 U.S. at 640-41. The school's mission, however, was inadequate to override the students' free speech rights. While *Barnette* involved compelled speech rather than punishment for actual speech, the school district's interest in its self-defined "mission" or "work" was identical to the interest claimed here and was insufficient. (While *Barnette* also involved the students' religious convictions, this Court has made clear that it is a free speech case. *Id.* at 634-35 ("many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual"); *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881-82 (1990) (describing *Barnette* as a case where First Amendment barred application of neutral, generally applicable law to religiously-motivated action because it involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . .").)

Moreover, if a school can define its "basic education-

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[3](...continued)
subject." Petitioner's Brief ("Pet. Br.") 32. *See also* DARE Br. 13-14 (banner itself was the "disruption"). Of course, one could say the same thing about John Tinker's black arm band worn in, for example, his math class. The lesson of *Tinker* is that the speech itself cannot be deemed to "interfere" with the school's work -- if it did, *Tinker* would be meaningless -- and that apprehension of actual interference cannot be based upon sheer speculation.

al mission" -- or, as the School and its amici put it when discussing *Tinker* (Pet. Br. 20, Brief of United States ("U.S. Br.") 17), the "work of the school" -- as broadly as it wishes and punish speech inconsistent with that "mission" or "work," it is hard to envision what a school cannot regulate. Surely, any speech that might encourage an activity harmful to health can be regulated under this theory. Obesity, for example, is an increasing problem for students of all ages, and it apparently has significant deleterious effects on related health problems and resulting absenteeism. *E.g.*, Child Nutrition And WIC Reauthorization Act of 2004, Pub. L. 108-265, § 401, 118 Stat. 729, 788 (2004) (Congress finds that "childhood obesity in the United States has reached critical proportions" and "is associated with numerous health risks"); Stacey L. Fabros, *A Cry For Health: State And Federal Measures In The Battle Against Childhood Obesity*, 7 J. L. & Fam. Stud, 447, 447 (2005) ("The fearsome effects of childhood obesity are many, including . . , type 2 diabetes, high cholesterol, high blood pressure, and sleep apnea"); Oregon School Board Ass'n, *The High Cost of Childhood Obesity* (available at http://www.osba.org/-hotopics/atrisk/obesity/highcost.htm). Bad eating habits have been linked to poorer academic performance. *Id.*; Carol Torgan, *Childhood Obesity On The Rise*, The NIH Word On Health (June 2002) (available at http://www.nih.gov/news/-WordonHealth/jun2002/childhoodobesity.htm) ("One of the most severe problems for obese children is sleep apnea (interrupted breathing while sleeping). In some cases this can lead to problems with learning and memory."); A. Datar & R. Sturm, *Childhood Overweight And Elementary School Outcomes*, 30 Int'l J. of Obesity 1449 (2006) (available at http://www.nature.com/ijo/journal/v30/n9/pdf/0803311a.pdf) (change in overweight status is significant risk factor for reduction in learning and behavioral outcomes for girls in early elementary school years). Under the expansive notion

of "basic educational mission" proffered by the School and its amici, a school can define its basic educational mission to include inculcating healthful eating habits in its students. An invitation to a birthday party at which sweets and birthday cake will be consumed can be speech inimical to that mission, and punished. *Cf.* Petition for Writ of Certiorari ("Petition") at 15 (pro-drug messages are "inconsistent with the mission of schools to promote healthy lifestyles"); U.S. Br. 11 ("The health and safety mission of our public schools is especially pronounced in the context of this case."); *id.* 16 (schools must "protect students' health, safety, and ability to learn").

In an effort to confine such a dangerously expansive notion of school authority over student speech, the School and its amici also argue that Frederick's speech promoted an *illegal* activity. *But cf.* U.S. Br. 27 (speech could have been sanctioned even if banner had read "legalize marijuana").[4] But this gambit costs the theory whatever coherence it might have had. Why should a school's mission be defined only

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[4] The School and its amici generally insist that this Court invest the phrase "Bong Hits 4 Jesus" with significant meaning, regardless of how Frederick intended it. But then it is not at all clear that it promotes illegal activity, even if we incorrectly assume that a bong can only be used with marijuana. As the Ninth Circuit noted, Alaska has cast doubt on whether laws against smoking marijuana are consistent with that state's constitution. Pet. App. 6a n.4. And, to the extent that Frederick's ambiguous speech promotes marijuana use as part of a sincere religious practice, such conduct is most likely protected under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (affirming preliminary injunction under RFRA precluding federal government from using Controlled Substances Act to prosecute religious sect for using hallucinogen as part of communion ritual). *Compare* U.S. Br. 26 n.5 ("no question . . . that federal law prohibits marijuana possession"); DARE Br. 18 n.32.

by *external* goals set in society at large? One might think that failing to devote time to homework is even more detrimental to a high school student's ability to succeed than driving five miles per hour over the speed limit, even though the broader society has rules against the latter but not the former. Why should speech discouraging homework be protected while "Go Speed Racer" t-shirts, which might encourage student-drivers to exceed the speed limit, are not?

In any event, the drop in coherence does not even buy much of a reduction in the theory's expansiveness. For example, sexual intercourse and other kinds of sexual acts between high school students are illegal, and often felonious, in many states.[5] Moreover, it obviously can lead to conditions, such as teen-age pregnancy or sexually-transmitted diseases, inimical to students' education. Even under the narrower version of the "basic educational mission" theory, every statement in the locker room or hallway deemed to "promote" such crimes can be prohibited.

None of this speech restriction is at all necessary. Schools have the ability to speak themselves to send a message to their students. Both the schools and society itself have the means to combat actual illegal activity. If there is

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[5] *E.g.*, Ariz. Rev. Stat. § 13-1405 (1997) ("sexual conduct with a minor" includes sexual intercourse or oral sex with anyone under eighteen); Conn. Gen. Stat. § 53a-71(a)(1) (1999) ("second degree sexual assault" would include intercourse between a 17 year old and a 15 year old); Ga. Code Ann. § 16-6-3 (2006) ("statutory rape" includes intercourse with any person under 16); Kan. Stat. Ann. § 21-3522(a) (2005) ("unlawful voluntary sexual relations" includes sex between a 15 year old and a 16 year old); Minn. Stat. § 609.344 (2006) ("criminal sexual conduct in the third degree" includes sex between a 15 year old and a 17 year old); Mont. Code Ann. §§ 45-5-501, *et seq.* (2003) (sex with anyone under 16 constitutes "sexual assault").

speech that school officials reasonably believe will *directly* disrupt the educational process, by causing illegal or other activity undermining the educational process in a way both temporally near and reasonably likely to occur, it can be punished under *Tinker*. By seeking an expansion of *Fraser* to cover this situation, the School and its amici ask here for bludgeon to kill a flea.

2. The School and its amici tie the expansive notion of "basic educational mission" with an equally broad concept of "school-sponsored activity" at which the School's full speech-suppressing authority is available. Although the Ninth Circuit agreed that the observation of the Olympic torch relay was a school event, and declined to analyze it as a "sidewalk speech" case (Pet. App. 5a-6a), its analysis gave some weight to the fact that it was an event occurring partly off-campus and with minimal school supervision. Pet. App. 17a ("Frederick's banner . . . was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials").

The School and its amici assail this nuanced approach, and insist that the school's full speech-suppressing authority should be available at anything that can be called a "school event." *E.g.*, U.S. Br. 23 ("Nor is there any basis in the First Amendment for applying different levels of scrutiny to student conduct or expression at different off-campus school events."); DARE Br. 15-17. Contrary to the impression they seek to give, though, the Ninth Circuit did not invent the nuanced approach. *Fraser*, 478 U.S. at 689 (Blackmun, J., concurring) ("Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse

were less weighty."). Moreover, while advocating a bright line between "school-sponsored events" and other activity, the School and its amici do little to define where it is drawn -- except to insist that the students' observation of the Olympic Torch Relay falls on their side of it. *E.g.*, Petition 1 ("at a school-sponsored and faculty-supervised event taking place on and adjacent to school grounds during school hours").[6]

Is a football game or other sporting event held after hours a "school event" for this purpose? Would it matter if the school's pep band attended as a group? Or if the event did not take place at the school's facilities, but at some third-party site? If students are told to visit a museum over the next week and report on something they see there, is each student's separate trip a "school event"? The School and its amici cannot answer these questions because they do not identify where the bright line between "school-sponsored events" and other events is drawn.

Not everything involving a student during school hours constitutes a "school-sponsored event," regardless of its attenuated connection to school authorities or its degree of school supervision. If it did, every student given permission to study in the town's public library during school hours

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[6] The School and its amici also never quite settle on whether the "event" that was "school sanctioned" was the torch relay itself or the students' observation of it. *Compare* Pet. Br. 31 ("The Olympic Torch Relay was an important community event" with which Frederick's banner interfered) *with* U.S. Br. 22 ("Coca-Cola may have sponsored the relay, but the school sponsored its students' attendance at that event"). Plainly, the School did not "sanction" or "sponsor" the torch relay itself, which would have taken place with or without the consent of the School, so to the extent that Frederick purportedly interfered with the relay, he was not interfering with a "school event" at all.

-- as shown in Part II of this Argument, there is evidence to show less than that here -- would be participating in a "school event," and their speech subject to the full panoply of school regulation, just as if they were speaking in the middle of calculus class. The School and its amici complain about courts "overseeing a typology of school-related activities" (DARE Br. 16), but some lines *must* be drawn if students' entire lives are not to be given over to schools' speech-suppressing agenda -- and the School and its amici just refuse to do so. The Ninth Circuit's nuanced approach does not use rigid categories. It provides a case-sensitive analysis that allows courts properly to measure the school's interest in its "educational mission" in the particular context in which the speech took place.

In addition to claiming that Frederick's speech was at a school-sponsored *activity*, the School and its amici also try to characterize Frederick's speech as school-sponsored *speech*, *i.e.*, speech with the school's imprimatur as in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Specifically, the School argues that it would have given its imprimatur (or would have been perceived to have done so) had it *not* punished Frederick. Pet. Br. 15 (banner, if not punished, conveyed message that "drug-use promotion is openly tolerated"); *id.* at 33-34; NSBA Br. 14 n.16. In short, the School argues that *all* speech at a school-sponsored activity is school-sponsored speech. *E.g.*, Pet. Br. 33. Since classes and walking in the halls between classes are "school-sponsored activities," there is little expression (including Tinker's armband) that could not be characterized as "sponsored" by the school.

While citing *Kuhlmeier* for this proposition, the School and its amici ignore the fact that this Court considered and rejected that very argument in that case. *Kuhl-*

meier, 484 U.S. at 271 n.3 (fact that school permitted underground newspaper to be sold on a state university campus did not make it school-sponsored speech). "Onlookers" would not "reasonably perceive" (NSBA Br. 14 n.16) all speech on school property or at school events as bearing the imprimatur of the school just because the school respects students' right to free speech.[7]

3. Two other arguments deserve brief mention. First, the School and its amici assert that local school board control is important and that this Court should not attempt to micromanage the thousands of local school districts in this nation. *E.g.*, Pet. Br. 18-20; NSBA Br. 17-19. The short answer -- and the one already given by this Court -- is that this Court does not "micromanage" anything except its own area of expertise: the individual rights of citizens of the United States, including high school students. *Barnette*, 319 U.S. at 637-38 (rejecting argument that decision would make the Court the school board for the country; "small and local authority may feel less sense of responsibility to the Constitution"); *id.* at 638-39 (rejecting argument that courts possess no special competence in education; "our duty to apply the Bill of Rights to assertions of official authority [does not] depend upon our possession of marked competence in the field where the invasion of rights occurs").

Second, one of the School's amici offer two alternative interpretations of Frederick's speech which, it claims,

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[7] The School and its amici focus on this Court's statement in *Kuhlmeier* that a school "must also retain the authority to refuse to *sponsor* student speech that might reasonably be perceived to advocate drug or alcohol use," *Kuhlmeier*, 484 U.S. at 272 (emphasis added). *E.g.*, Petition 16. But if this Court meant that schools have "latitude in *regulating*" such student speech (*id.* (emphasis added)), it could have said so.

can justify taking it from the First Amendment's protective carapace. One interpretation of "Bong Hits 4 Jesus" is that it "mock[s] Christianity's central religious figure and trivializ[es] faith traditions" and thus is a "hurtful" opinion that can be regulated on that ground. NSBA Br. 21. Another is that the speech was "jabberwocky" or "nonsense" entitled to no First Amendment protection at all. *Id.* at 22-23. These arguments are obviously self-contradictory and have no roots in this Court's First Amendment jurisprudence. Tinker's armband may very well have been offensive to those whose parents or friends were fighting or had been killed in Viet Nam. *Tinker*, 393 U.S. at 509 n.3 (school was concerned that friends of a former student killed in the war would take offense). That speech may offend is never a basis for punishing it. And the NSBA offers no support for its suggestion that courts should analyze the importance of what was said in determining the protection offered by the First Amendment, a prospect far more dangerous than anything suggested by the opinion below.

II. This Court May Affirm The Judgment Below On Other Grounds As Well

Frederick may raise any argument properly raised that would support the judgment of the court below. This Court may affirm on any such ground. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (affirming on ground not relied upon by the court below and not addressed in the petition for certiorari). As noted in the Statement of the Case, the Ninth Circuit did nothing more here than vacate the district court's granting of summary judgment to defendants. It did not grant Frederick summary judgment. *Good News Club v. Milford Central School*, 533 U.S. 98, 129 (2001) (Breyer, J., concurring) ("To deny one party's

motion for summary judgment, however, is not to grant summary judgment for the other side. There may be disputed 'genuine issue[s]' of 'material fact,' Fed. Rule Civ. Proc. 56(c), particularly about how a reasonable child participant would understand the school's role").

On defendants' motion for summary judgment, of course, all disputed facts, and all inferences from the undisputed facts, had to be weighed in Frederick's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Although the School wants this Court to rely upon "the facts as determined by the two lower courts" (Pet. Br. 35), it does not explain what business those courts had *determining* facts on summary judgment motions. *E.g.*, *Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24*, 323 F.3d 375, 380 (6th Cir. 2003) ("By its very nature, a summary judgment does not involve the determination of disputed questions of fact, but is confined to purely legal issues.").

With that standard in mind, the judgment of the Ninth Circuit denying defendants summary judgment can be affirmed for a variety of reasons not relied upon by the Ninth Circuit.

1. As noted previously, the Ninth Circuit took a nuanced approach to the question of what speech regulation is consistent with the First Amendment at "school events," taking into account the context of the event and the school's interest at that event, while the School and its amici espouse a bright line test. But both the Ninth Circuit and the School have ignored evidence that the observation of the Olympic torch relay was not, in any reasonable sense, a "school event" at all, particularly if the School's "bright line" test

must be adopted.

Micaela F. Croteau testified as follows:

> On the day on which the Olympic Torch Relay was to be run through Juneau, the school allowed students to go out to the street to watch it . . . We were not required to stay together as a class, and I think only the gym class stayed together. *We were just told to come back to our next class at a particular time.*

J.A. 36 (emphasis added). Similarly, Sara Croteau testified:

> [W]hen the torch relay was being run near our school, the teacher announced that we could go watch it. Some students did, others did not, and the teacher made no effort to keep those of us who did go out together.
>
> We stood in the snow for a long time waiting for the torch to come by. *Many* people got bored and left. The school administrators weren't stopping *any* of the people who left. . . I could have done *whatever I wanted*.

J.A. 38 (emphasis added).

This testimony must be taken as true, and reasonable inferences from it made in Frederick's favor. If the *only* thing that teachers told students at Juneau Douglas High School was that they had to be back to their next class at a particular time, and school administrators did nothing to stop

even one of the many students who chose to leave the torch relay route, then it is reasonable to infer that the students had a free period to do what they wanted. While this surely was done to accommodate those who wanted to watch the Olympic Torch Relay, students had no obligation to watch it or to stay anywhere near the high school. Under these circumstances, the School had no reasonable basis for believing that this was a "school event" at all at which it could regulate the speech of its students. Pet. App. 5a (characterizing case as a "sidewalk speech" case would make it much easier to decide).[8]

A school cannot offer its students an opportunity to go out to the public square unsupervised, and then punish them for doing what any other citizen in the public square could do. This Court may affirm the judgment of the Ninth Circuit on the ground that there was an issue of fact relating to whether this was a "school event" at all.

2. The School claims that it punished Frederick because his speech violated its policy 5520 in that it "advocate[d] the use of substances that are illegal to minors." Frederick presented evidence on the motions for summary

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[8] *Compare* Pet. Br. 3 ("Once outside the classroom, the students were allowed to be in only one place -- in front of the school, either on campus or lined along either side of the street . . . the student body remained under the supervision of high school administrators, teachers, and staff"); Petition 5 n.3 ("students remained under faculty supervision and were not otherwise released from school"). The School claims that the student affidavits -- which it asserts, without support, came from "Frederick's friends" -- "did not contradict evidence presented by the school district that set forth in detail the supervisory roles of administrators and teachers." Pet. Br. 13 n.3. This is nonsense. Testimony that there was no obligation to attend and no supervision at all obviously contradicts the School's efforts to say otherwise.

judgment that this was a pretext. Specifically, Frederick testified that the school tolerates all kinds of t-shirts with messages promoting drug or alcohol use. J.A. 31. If so, a reasonable trier of fact could conclude that his speech was punished not for its content, and not because it interfered with the School's interest in deterring the use of illegal substances, but because Morse was embarrassed that the message could be seen by non-students. But the school has no legitimate interest in restricting student speech to outsiders when it permits the same speech to be made to other students. *Cf. Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 190-91 (1999) (prohibition against advertising of privately-run gambling casinos violated First Amendment where government permitted advertising of other casinos operated by government and Indian tribes).

3. Finally, the district court erred in granting summary judgment to the Juneau School Board on grounds of qualified immunity. Pet. App. 26a-30a. Entities like the Juneau School Board do not have qualified immunity. *Owen v. City of Independence*, 445 U.S. 622 (1980). Accordingly, the Ninth Circuit's judgment vacating the award of summary judgment to the school board can be affirmed on that ground as well.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[*]

The Christian Legal Society (the Society) is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and members at over 140 accredited law schools. The Society's legal advocacy division, the Center for Law & Religious Freedom (the Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This case is about far more than the propriety of Deborah Morse's reaction to Joseph Frederick's ill-advised stunt. Distilled to its essence, this case is about public school power versus student freedom. More specifically, it concerns the extent to which the Constitution constrains the power of government education officials to censor or punish student expression that they find objectionable. As is true for most of this Court's cases, both the reasoning and result will almost certainly have a significant impact upon disputes involving different facts and circumstances.

The *amicus* submits this brief neither because of its offense at Frederick's reference to Jesus nor because his banner somehow constituted the sort of "religious expression" this Court has traditionally protected. Instead, *amicus* intends to warn this Court how undue deference to public school power in this case would almost certainly end up undermining legitimate expressions of religion by public school students.

The *amicus* is particularly concerned by the desire expressed by the National School Boards Association, the American Association of School Administrators, and the National Association of Secondary School Principals for increased power to censor or punish student speech they believe "invades the rights of others." Religious organizations, including student religious groups, coalesce around shared religious commitments. They draw their leaders from among those who

voluntarily share those religious commitments, whether they be doctrinal or ethical. Many government officials, including many who govern public educational institutions, condemn such commonplace and benign actions as "discrimination" that injures others. The *amicus* respectfully requests that the Court, in adjudicating this case, be mindful that many school officials desire to punish such exercises of religious expressive association without meaningful constitutional limits.

The *amicus* is also concerned by the stated desire of Petitioners and some of their *amici* for wide latitude to censor or punish student expression that they deem inconsistent with their "educational mission" or with "evolving community standards" they themselves identify. Too many public education officials believe that legitimate expressions of religious belief contradict their educational missions and conflict with the "values" they hope to instill in students. Granting school officials undue power to censor or punish expression on this basis is a recipe for significant diminution of student religious freedom in our nation's public schools, something this Court has consistently protected.

Finally, the *amicus* urges this Court not to analyze the instant case under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), given the potential negative impact such an analysis might have on the freedom that student religious speakers currently possess.

ARGUMENT

I. This Court Should Not Give Public Education Officials Undue Power to Censor or Punish Student Expression on the Ground That It Allegedly "Invades the Rights of Others"

In their *amicus* brief, three associations representing the majority of this nation's public school officials ask this Court for increased power to censor or punish student speech that "offends" others, even though the Petitioners did not suspend Joseph Frederick from school on this basis. This Court should decline their invitation. Unfortunately, in the absence of meaningful constitutional restraints on their power, history tells us that many public school officials will almost certainly use this power to prevent or punish legitimate expressions of student religious belief and commitment, including the benign and commonplace practice of organizing around shared doctrines and ethical precepts.

A. The NSBA Seeks Additional Latitude to Censor or Punish Student Expression That Allegedly "Offends" Others

Invoking *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the National School Boards Association and its co-*amici* seek additional latitude to censor or punish student speech that might be perceived as "hurtful" by another student. (NSBA Brief at 21). They desire the authority to suppress "hurtful messages" even if

"the others suffer those messages in silence." (*Id.*) *See also id.* at 3, 20-22 (seeking power to regulate student expression that "intrud[es] on the rights of other students"; that might be "threatening or hurtful" to other students; that "collides with the rights of other students"; that is "insulting," "derogatory," or "disrespectful"; or that involves "palpably hurtful expressions of disrespect for others").

B. Religious Students and Student Groups Sometimes Undertake Actions That Many Public School Officials Believe "Offend" Others

Religious groups organize around shared religious commitments. In order to maintain their particular character over time, many religious groups express their shared commitments in creeds, confessions, catechisms, or statements of faith, drawing their leaders and members from those individuals who voluntarily share the commitments expressed in those documents. Other groups do not codify their doctrines in this manner but nonetheless maintain a communal understanding of orthodoxy.

By drawing their leaders and members from those who share the group's religious commitments, individuals who reject the group's commitments are necessarily ineligible for leadership or membership. However, many religious groups communicate their religious beliefs to those who do not currently share these commitments in the hope that they will embrace them and join the community. These groups therefore do not shun, reject, or belittle non-

adherents, but instead reach out and welcome them out of genuine concern for their temporal happiness and eternal destiny.

Religious individuals and groups also communicate controversial messages. At its best, religion voices prophetic critiques of injustice and unrighteousness, urging individuals and society to do better. Without question, those whose actions are the subject of such assessments are often "offended." Martin Luther King, Jr., undoubtedly offended the likes of Bull Connor. Dietrich Bonheoffer "insulted" the Nazis. British slave traders almost certainly felt that William Wilberforce had "disrespected" them. The Apostle Paul observed in his letter to the Galatians that many perceived the Gospel message as an "offense." (Galatians 5:11.) His assertion in his letter to the Romans that "all have sinned and fall short of the glory of God" certainly did not (and to this day *does* not) endear him to those confident of their own righteousness. (Romans 3:23.)[1]

C. Many Public Education Officials Believe that Such Actions "Invade the Rights" of Others

Aside from the generic "offense" that others might feel in reaction to prophetic calls for repentance from injustice and unrighteousness,

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[1] It should be noted that religious students are sometimes on the receiving end of offensive remarks. In its brief, the NSBA acknowledges this, observing that Frederick's banner "might plausibly be interpreted as mocking Christianity's central religious figure and trivializing faith traditions or sincerely held religious beliefs in general." (NSBA Brief at 21.)

many public education officials believe that religious expression can "invade the rights" of others in two main ways. First, certain religious expression is seen as violating a right to be free from discrimination. Second, some student religious speech is thought to constitute a "verbal assault" on others, thereby transgressing the rights of others to be free from such attacks.

1. Religious expressive association and third parties

Many government officials – including those involved in public education – have concluded that when religious individuals voluntarily coalesce into groups around common religious commitments, they "insult," "offend," "injure," "disrespect," are "hurtful" to, and "invade the rights" of third parties. If this Court gives public school officials broad latitude to censor and punish expression that "interferes with the rights of others," one can be sure that many principals, superintendents, and school boards will invoke this power to forbid religious students from undertaking such benign and commonplace activity.

Many public higher education officials have already punished religious student groups that draw their leaders and official members from those that voluntarily share their religious commitments, contending that they are protecting non-adherents from insult, offense, injury, disrespect, and an invasion of their rights. These officials have concluded that these religious groups' policies and practices constitute "discrimination" on the basis of

religion or sexual orientation.[2] Law school chapters of the Christian Legal Society (CLS), a 44 year-old association of Christian lawyers, judges, law professors, and law students, have endured a relentless assault by law schools intolerant of their unpopular perspective on the morality of homosexual conduct or the relevance of religious belief. Just within the last three years, public university officials have threatened, de-recognized, or denied benefits to CLS law student chapters at Ohio State University, Washburn University, Arizona State University, University of California Hastings College of Law, the University of Iowa, the University of Toledo, the University of Wisconsin, and Southern Illinois University. Other religious student groups at the University of North Carolina, Penn State University, the University of Oklahoma, the University of North Dakota, the University of Minnesota, the University of Missouri, and the University of Georgia have confronted similar problems in the recent past.

Certain of these universities, including Ohio State, Washburn, Penn State, Toledo, and

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[2] The *amicus* rejects the notion that religious student groups commit "discrimination" by taking religious belief and moral conduct into account in choosing their leadership and voting membership. Properly understood, "discrimination" is the invidious reliance upon irrelevant characteristics. Religious groups' preservation of their religious character is not invidious; religious belief and moral conduct are not irrelevant. *Cf.* 42 U.S.C. §2000e(j) (exempting religious employers from Title VII's ban on religious discrimination in employment). Furthermore, most religious groups do not focus on "sexual orientation," to the extent that phrase is defined as a person's experience of same-sex or opposite-sex sexual attraction. They instead focus on conduct (extramarital sexual activity, whether it be homosexual or heterosexual), belief, and advocacy.

Minnesota, wisely amended their non-discrimination policies to respect the religious freedom rights of religious student groups, either before or shortly after litigation ensued. *See, e.g., Christian Legal Soc'y Chapter of the Ohio State Univ. v. Holbrook*, S.D. Ohio No. 2:04-cv-197; *Maranatha Christian Fellowship v. Regents of the Univ. of Minn. System*, D. Minn. No. 0:03-cv-05618; *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley*, D. Kan. No. 5:04-cv-04120; *DiscipleMakers v. Spanier*, M.D. Pa. No. 4:04cv-02229 (Penn State University); *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson*, N.D. Ohio No. 3:05-cv-07126; *Beta Upsilon Chi v. Adams*, M.D. Ga. No. 3:06-cv-00104-CDL (University of Georgia). However, a number of universities have steadfastly refused to accommodate these groups' sincere religious beliefs and exercise, vigorously contesting the student groups' efforts to vindicate their constitutional rights in court. *See Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow*, D. Ariz. No. 2:04-cv02572 (ASU changed its non-discrimination policy to respect religious freedom on the eve of trial); *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Kane*, 2006 WL 997217 (N.D. Cal. No. 3:04-cv-04484 May 19, 2006), *appeal pending*, 9th Cir. No. 06-15956; *Alpha Iota Omega Christian Fraternity v. Moeser*, 2006 WL 1286186 (M.D.N.C. No. 1:04-cv-00765 May 4, 2006) (University of North Carolina); *Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker*, 453 F.3d 853 (7th Cir. 2006).

In these cases, the universities and their supporters contend that punishing a religious

group's expressive association protects the interests of third parties. In *Christian Legal Society v. Kane*, the district court permitted Hastings Outlaw, a homosexual rights advocacy organization, to intervene as a defendant in the case after concluding that it had a significant protectable interest in nondiscrimination on the basis of sexual orientation. In the brief it submitted to the Ninth Circuit on appeal, Outlaw argued that Hastings College of Law should be permitted to de-recognize the CLS chapter so that "lesbian, gay, and bisexual students [could] attend law school in an environment free from discrimination and ... have an equal opportunity to become members of any registered student organization without regard to their sexual orientation [or] religion." (Brief of Hastings Outlaw at 1-2). *See also id.* at 5 (Hastings needs to punish the CLS chapter "to protect its students from the harmful impact of invidious discrimination"); *id.* at 6 (Hastings needs to derecognize the CLS chapter "in order to address the harmful, non-expressive consequences" of the chapter's practices).

This phenomenon – school officials punishing religious associational freedom to protect third parties from "discrimination" – is not limited to the higher education context. In *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2nd Cir. 1996), a public high school argued that it needed to withhold recognition of a student religious group that drew its leaders from among those sharing its religious beliefs in order to protect non-adherents from "animus." The school district asserted that the club's means of preserving its religious identity "would disadvantage, subordinate, or stigmatize the

excluded students." *Id.* at 871. The school district further contended that the club's policy "creates multiple 'classes' of students, balkanizes the student community and breeds contempt, distrust and dissen[s]ion." *Id.* It therefore argued that *Tinker* permitted it to withhold valuable benefits from the club. In its supportive amicus brief, the New York State School Boards Association argued that the school district needed to punish the club so that it would not "trample upon the constitutional rights of others." 1995 WL 17203499 at *12.

2. Student religious speech and the right to be free from "verbal assaults"

The Ninth Circuit's opinion in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), illustrates the desire of many public school officials to punish controversial religious speech in the name of protecting third parties who might be offended thereby – as well as the willingness of some federal judges to find this constitutionally permissible.

In this case, school officials ordered a high school student to remove a t-shirt that said "homosexuality is shameful," a paraphrase of verse 27 of chapter 1 of Paul's letter to the church at Rome, a text (like all books in the Christian canon of Scripture) considered by many Christians to be inspired by God.[3] The student filed suit, alleging a violation of his First Amendment rights. In denying his request for a

[3] "Likewise also the men, leaving the natural use of the woman, burned in their lust for one another, men with men committing what is shameful." Romans 1:27.

preliminary injunction, a divided panel of the Ninth Circuit held that the student was not likely to succeed on the merits of his claim. *Harper*, 445 F.3d at 1175-1192. The panel majority concluded that *Tinker* permitted school officials to prohibit him from wearing a t-shirt bearing a paraphrase of a Bible verse because that verse "intrude[d] upon ... the rights of other students." *Id.* at 1175. The panel majority's willingness to conflate a student's paraphrase of a Bible verse with persistent, personally-directed harassment and even violence, *id.* at 1178-1183, is a particularly worrisome aspect of its opinion.

In their *amicus* brief, the NSBA and its co-*amici* identify *Harper v. Poway* as a correct application of *Tinker*'s statement that public schools may restrict student expression to protect the rights of others. (NSBA Brief at 2 n.2, 21-22). They thus reveal the scope of the power they seek from this Court.

D. This Court Should Not Give Government Officials Power to Censor or Punish Student Expression Simply Because It Offends Others

In this case, the Petitioners and their *amici* urge this Court to grant them the power to censor and punish expression that invades the rights of others. In their eyes, the category of expression that invades the rights of others is extremely broad. Religious individuals and groups often express themselves in ways that others might find offensive. Public school officials are very much inclined to censor and punish

religious expression to prevent invasion of the rights of others.

This Court should not give them that power, particularly when it threatens religious liberty, Americans' first freedom. The Court has consistently protected religious speakers from overzealous public education officials. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. of Westside Cmty. Schs. v. Mergens,* 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 389 (1993); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98 (2001). The *amicus* respectfully encourages the Court to remain true to this admirable track record by adjudicating this case in a manner that does not give school officials undue power – power they will almost certainly use to censor and punish religious expression, both speech and association.

Tinker itself provides a basis for rejecting the request for essentially unchecked authority to regulate student speech on the ground that it offends others. The *Tinker* Court declared that school officials may not prohibit speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. Under *Tinker*, First Amendment freedoms should not be subordinated to a desire to prevent someone from experiencing "discomfort" or "unpleasantness," even where school officials

hyperbolically characterize assertive religious speech as "verbal assault."

This Court should be particularly willing to protect student expression on issues about which the country is deeply and seriously divided. Thankfully, very few parents want their children to take illegal drugs. Yet a large percentage of American parents want their children to believe and follow the teachings of scriptures they believe are divinely inspired, including teachings about the morality of extramarital sexual intimacy. To be sure, many parents, students, school boards, superintendents, and principals reject these teachings; indeed, the percentage of the population that disagrees with such views may well be growing. Yet this is precisely why the counter-majoritarian First Amendment must not be weakened.

Finally, a legal rule turning on the "offensiveness" of speech in the eyes of another is deeply problematic. It is virtually impossible to apply such a vague and potentially limitless standard in an even-handed manner. Inevitably, school officials will end up either punishing only speech that offend *them* or censoring far too much expression in an effort to prevent any potential offense that might possibly occur.

II. This Court Should Not Give Public Education Officials Undue Power to Censor or Punish Student Expression on the Ground That It Contradicts Their Educational Mission

The Petitioners and their supportive *amici* urge this Court to loosen the constitutional restraints on their power to censor or punish student expression on the ground that it contradicts a school system's educational mission. Invoking *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), they desire substantial deference to their articulation of their educational mission and to their identification of student expression that undermines it.

A. Many Public Education Officials Believe That Student Religious Expression Undermines Their Educational Mission

It is eminently reasonable to fear that public school officials, if given the expansion of power they seek, will use that power to censor or punish religious expression. First, public education officials have consistently argued that religion and religious expression in general conflict with their core educational mission. Second, public education officials have repeatedly argued that certain exercises of the right of associational freedom contradict the values they hope to instill in students. Third, many public education officials believe that religious speech on controversial moral issues is socially inappropriate or uncivil.

1. Public Education Officials Have Often Asserted That Religion and Student Religious Expression in General Do Not Belong in Public Schools

Many of the disputes between student speakers and public school officials over the years have involved religion. Most often, public schools invoked the Establishment Clause to defend their discrimination against student religious speakers. However, they often revealed in these lawsuits their more foundational objection to religion in the schools.

For example, in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 389 (1993), the National School Boards Association, an *amicus* in the instant case, encouraged this Court to reject a religious group's claim that a public school district violated their First Amendment rights by denying it after-hours equal access to meeting space in a school building. Among other things, the NSBA urged this Court to defer to school boards' understanding of their "educational mission," including "the preparation of students for citizenship in a democratic society" for which purpose "public school officials and the school community must conduct themselves in a manner which engenders among schoolchildren tolerance, understanding, and a sense of community." With an ironically deficient definition of "tolerance, understanding, and a sense of community," the NSBA and its fellow *amici* then argued that access for a religious community group would "detract from the achievement of this aspiration."

In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the NSBA again filed an *amicus* brief in support of school officials' exclusion of the religious community group. The NSBA claimed that the school district had the authority to limit its after-school uses to "only those activities consistent with its mission," a mission the district's exclusion of the religious community group furthered because of the "impressionability of students and the inappropriate subject matter on school grounds." *See also Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3rd Cir. 1990) (school district denied religious group equal access under "policy [that] purport[ed] to limit access to those organizations, groups, and activities which are compatible with the mission and function of the school system").

2. Some Public Education Officials Believe That Exercises of Religious Associational Freedom Contradict Their Educational Mission

In multiple contexts, public education officials have revealed their view that exercises of religious associational freedom contradict their educational mission.

As discussed above, numerous government institutions of higher education have denied valuable benefits to religious groups that have exercised their right of religious associational freedom by coalescing around shared religious beliefs and ethical precepts. Schools like Southern Illinois University, the University of Wisconsin, and

Hastings College of Law have de-recognized religious student groups not only to prevent other students from suffering offense, but also because such exercises of religious associational freedom are deemed to contradict the schools' educational mission.

In their challenge to the Solomon Amendment, numerous law schools revealed how they view their "educational mission" and how they identify the "civic values" they hope to instill in their students. *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S. Ct. 1297 (2006). They challenged the Solomon Amendment on the ground that compliance therewith interfered with their effort to inculcate students with their chosen perspective on a controversial political and moral question by excluding others holding a contrary view. The association, which included a number of public law schools, contended that facilitating the recruitment efforts of the military – an employer that takes same-sex sexual conduct into account – undermined the ability of its members to communicate their disapproval of such employment practices to their students.

Although *Rumsfeld* concededly involved institutions of higher education dealing with the military rather than K-12 public schools dealing with their students, the law schools' understanding of their educational mission matches the view many K-12 officials have of their own objectives. To illustrate, the school district in *Hsu v. Roslyn Union Free School District*, 85 F.3d 839 (2nd Cir. 1996), argued that allowing a student Bible club to draw its

leaders from those who professed faith in Christ would materially interfere with its educational mission. *Id.* at 870-82.

B. This Court Should Not Give Public School Officials Undue Power to Restrict Religious Expression on the Ground that It Undermines a School's Educational Mission

The *amicus* respectfully requests that this Court not confer undue power upon school districts to restrict religious expression on the ground that it undermines a school's educational mission.

It is not hard to imagine how public educational institutions might use their expanded power to limit dissent, and to do so in the name of "inculcating values" in their students. Revisiting historical controversies suggests all too plainly how excessive power would be employed if recognized by this Court.

In 1969, at the height of the controversy over American military involvement in Vietnam, students at Central Connecticut State College, a public institution, formed a local chapter of Students for a Democratic Society (SDS). *See Healy v. James*, 408 U.S. 169, 172 (1972). The president of the state college denied their request for official recognition as a campus organization in part on the ground that the group's "philosophy was antithetical to the school's policies." *Id.* at 175. The president declared that access to student group benefits "should not be granted to any group that 'openly repudiates' the

College's dedication to academic freedom." *Id.* at 175-76. This Court rightly held that the college's decision violated the students' First Amendment rights. *Id.* at 194. *See also Hudson v. Harris*, 478 F.2d 244 (10th Cir. 1973) (anti-war group denied recognition by state college stated First Amendment claim for relief).

During the same time frame, a number of public universities attempted to stifle fledgling student chapters of the American Civil Liberties Union. In the fall of 1969, a group of students at state-run Radford College in Virginia sought recognition of a campus ACLU chapter. *ACLU v. Radford Coll.*, 315 F. Supp. 893, 894 (W.D. Va. 1970). The college required that the "purpose and practices" of student groups be consistent with "the broad educational philosophy of Radford College." *Id.* at 894. In refusing to recognize the ACLU chapter, the faculty declared that the "role and purpose of the American Civil Liberty [sic] Union lies basically outside the scope and objectives of this tax supported educational institution." *Id.* at 898. The court held that Radford, as a state college, had violated the students' First Amendment rights. *Id.* at 899.

If Radford College possessed unchecked power to inculcate its students in its "broad educational philosophy" and its "scope and objectives" by excluding contradictory voices such as, in the eyes of Radford's 1969 faculty, the ACLU, it would have been able to suppress the formation of an ACLU chapter at the college. Similarly, if this Court did not interpret the Constitution to constrain Central

Connecticut State College, its students' freedom of expression would have been trampled.

Along the same line, if this Court, in adjudicating this case, confers broad power on public school officials to censor and punish expression that contradicts their educational missions, public schools will inevitably exercise that authority, at great cost to the freedom of students. The case reports amply illustrate how poorly public school systems have treated religious speakers. To confer additional power on education officials over student speech will inevitably undermine the freedom of religious speakers, something this Court has thankfully seen fit to protect, over and over again. It would indeed be unfortunate if this Court's adjudication of the instant case would undercut its repeated vindications of religious freedom in the public school setting.

III. This Court Should Not Expand the Scope of *Kuhlmeier*

In their brief, the Petitioners suggest that this Court analyze their actions under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which permits a school district to censor speech pursuant to "legitimate pedagogical concerns" if that speech reasonably might be perceived to bear the school's imprimatur. (Pet. Brief at 32-34.) This, of course, gives school officials even more power to regulate speech than do *Tinker* and *Fraser*. The *amicus* urges this Court to reject the rather dramatic expansion of *Kuhlmeier*'s reach proposed by Petitioners.

Petitioners' *Kuhlmeier* argument turns upon its speculation that if they had failed to punish Frederick, third parties might infer school endorsement of the message on his banner. They concede that "reasonable observers might have concluded that the banner's message was so inimical to the school's mission that it did not bear the school's imprimatur," but nonetheless imply that *Kuhlmeier*'s analysis should apply. (Pet. Brief at 33.)[4]

Given the circumstances of Frederick's display, the Petitioners' suggestion that *Kuhlmeier* applies is hard to square with this Court's consistent view that public schools do not endorse everything they permit. *See, e.g., Board of Educ. of Westside Cmty. Schs. v. Mergens,* 496 U.S. 226, 250 (1990) (observing the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (emphasis in original).

This axiom – that school toleration of student speech does not constitute school endorsement – is fundamental to the constitutional protection of student religious speech. To illustrate, U.S. Department of Education guidelines have for a dozen years advised public school districts to heed this Court's critical distinction between government speech endorsing religion and students' religious expression. In 1995, the Department of Education

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[4] As the Petitioners correctly note, the district court in this case did not even entertain the possibility that *Kuhlmeier* might apply. (Pet. Brief at 33 n.13.)

sent a guidance letter to all the Nation's public school superintendents entitled *Religious Expression in Public Schools*, which was reissued in 1998 and 1999.[5] These guidelines emphasized the difference between the school's speech and students' private religious expression.

In addition, on February 7, 2003, the Department of Education issued guidelines, approved by the Department of Justice, entitled "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools."[6] The DOE guidelines rest on the premise that the *Mergens* "line between— government-sponsored and privately initiated religious expression is vital to a proper understanding of the First Amendment's scope," which "establishes certain limits on the conduct of public school officials as it relates to religious activity, including prayer." DOE Guidance, "Overview of Governing Constitutional Principles," ¶ 1, 3. The guidelines state: "Student remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience." *Id.* at ¶ 6 (*citing Mergens,* 496 U.S. at 248-50). The guidelines affirm that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Id.* (*quoting Mergens,* 496 U.S. at 250).

The *amicus* is concerned that if this Court relies upon *Kuhlmeier* to reverse the Ninth Circuit's

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[5] Letter from Sec'y Richard Riley to American Educator May 30, 1998, http://www.ed.gov/Speeches/08-1995/religion.html (last visited February 14, 2007).

[6] *See* www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited February 14, 2007).

judgment, that analysis might be erroneously interpreted by some to undermine the Constitution's strong protection of religious speech that takes place in school settings. The *amicus* accordingly urges this Court to agree with the lower courts in this case that *Kuhlmeier* is inapplicable.

CONCLUSION

For the foregoing reasons, the *amicus* respectfully request that the Court affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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No. 06-278

In the Supreme Court of the United States

DEBORAH MORSE, JUNEAU SCHOOL BOARD, PETITIONERS

v.

JOSEPH FREDERICK, RESPONDENT

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR D.A.R.E. AMERICA, DRUG FREE AMERICA FOUNDATION, INC. NATIONAL FAMILIES IN ACTION, SAVE OUR SOCIETY FROM DRUGS, HON. WILLIAM J. BENNETT, AND GENERAL BARRY R. MCCAFFREY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools, at school-sponsored, faculty-supervised events, to prohibit students from displaying messages promoting the use of illegal substances.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

If allowed to stand, the Ninth Circuit's tortured misapplication of the rules governing student speech will severely undermine our schools' ability to protect students from the grave dangers of drug abuse. The susceptibility of teens to pro-drug messages is evidenced by the fact that *half* of American secondary school students have used drugs illegally by graduation, often on school property. Given the magnitude of the drug problem, and the health and safety concerns underlying policies like the Juneau School Board's, the Board and Principal Morse acted properly and well within their discretion as educators to create and enforce a policy that prohibited students from promoting illegal drug use.

The Ninth Circuit's failure to give *any* consideration, much less proper weight, to the school's interest in teen drug use led it to misapply this Court's student speech decisions. The court's attempt to limit *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), to its facts is particularly ill-considered: pro-drug messages are as "plainly offensive" to a school's educational mission as messages containing sexual innuendo. Contrary to the Ninth Circuit's conclusion, the First Amendment does not require hamstringing school officials in the fight against illegal drug use by our nation's teens.

That prospect is of particular concern to *amici curiae*—consisting of two former directors of the White House Office of National Drug Control Policy and leading national nonprofit organizations dedicated to fighting substance abuse (described more fully in Appendix A).[1]

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

These *amici* believe that strong anti-drug policies in our schools are vital to addressing illegal drug use by teens.

Amici further believe that preventing schools and school officials from prohibiting pro-drug displays under the aegis of the First Amendment not only endangers our children, but is also inconsistent with settled First Amendment law. School officials bear the weighty responsibility of fighting illegal drugs and sending students a clear message that drug use will not be tolerated. At a minimum, those officials must not be held *personally* liable for enforcing school policies prohibiting students from advocating illegal drug use when no court has heretofore even suggested that doing so is unconstitutional; the stakes of over-deterrence are too high to limit qualified immunity so severely.

STATEMENT OF THE CASE

Standing across from his high school, and in full view of the assembled student body, Joseph Frederick and several of his classmates unfurled a fourteen-foot banner reading "BONG HITS 4 JESUS." As these *amici* can attest, most students would have readily understood "BONG HITS" as referring to smoking marijuana through a water pipe. See also Joint App. 24, 117.

The principal asked the students to take down the banner—which Frederick has never claimed to be religious speech—because it violated school district policies prohibiting messages that advocate illegal drug use. Frederick refused, so Principal Morse confiscated his banner and gave him a ten-day suspension for that and other misconduct. See Pet. App. 2a-4a.

The school district superintendent and the Juneau School Board upheld Frederick's suspension (though the superintendent reduced it to time served, which was eight days). *Id.* at 4a. The District Court held that Principal Morse and the Juneau School Board had not violated Frederick's constitutional rights, and that, in any event,

they were protected by qualified immunity. See *id.* at 23a-44a.

The Ninth Circuit reversed, however, holding that the Constitution gives students the right to advocate—during a school event—that their classmates use illegal drugs. As far as the court was concerned, Frederick's message was more like the anti-war armbands in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), than the sexual innuendo running through the nomination speech in *Fraser*. See Pet. App. 8a-9a. In addition, the court held that *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), which recognized the right of school authorities to restrict objectionable content in a school newspaper, was irrelevant because "no sponsorship or curricular activity was involved" in Frederick's display of a fourteen-foot banner, in front of school property, during a school event, to the student body. Pet. App. 10a-11a.

To make matters worse, notwithstanding the fact that the superintendent, the school board, and the district court all agreed that Frederick's conduct was not constitutionally protected, the Ninth Circuit held Principal Morse *personally* liable because "no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful." *Id.* at 21a.

SUMMARY OF THE ARGUMENT

The decision below is fundamentally misguided as a matter of sound educational policy, and should be reversed under settled principles governing the speech rights of school students and the entitlement to qualified immunity of school officials.

I. Teenage drug abuse is an enormous national problem. It endangers the health and well-being of millions of children and undermines the educational mission of our schools.

The approach to student speech taken by the decision below, however, threatens to make vital anti-drug policies unenforceable. By requiring a case-by-case evaluation of pro-drug speech, and prohibiting any action unless a message causes an immediate and palpable disturbance in an "educational and curricular" activity, the decision below makes it difficult, if not impossible, for schools to address the cumulative effects of pro-drug advocacy.

II. Contrary to the Ninth Circuit's decision, the First Amendment does not require school officials to remain neutral when faced with pro-drug messages in the midst of a school activity. Such speech is "plainly offensive" under this Court's decision in *Fraser*, and schools are entitled to prohibit it.

Moreover, as *Fraser* and several other decisions of this Court recognize, courts must defer to decisions of school officials like those at issue here. The primary responsibility for regulating our public schools lies with school authorities and local communities, not the federal courts.

III. These principles demonstrate not only the flaws in the Ninth Circuit's constitutional analysis, but also the absurdity of the court's decision on qualified immunity. The stakes are too high to allow school officials to be sued for enforcing policies never before so much as questioned by any federal court. The threat of personal liability for the slightest misstep will chill enforcement of anti-drug policies far beyond the requirements of the First Amendment, compromising the health and well-being of public school children nationwide.

ARGUMENT

I. Teenage Drug Abuse Is A Problem Of Enormous Proportions Requiring An Array Of Policy Solutions And The Full Involvement Of School Officials.

The constitutionality of Principal Morse's conduct cannot fairly be determined without considering the depth and breadth of teenage drug abuse.

1. In 2005, 2.9 million Americans tried drugs for the first time, and more than half (56%) of those new drug users were under the age of 18.[2] Twenty-one percent of eighth-graders have used drugs—which means that on average six students in a classroom of 30 children, each about fourteen years old, have already used at least one illicit drug.[3] By tenth grade, another 17% of students have used drugs, bringing the total up to 38%. And "exactly *half* of American secondary school students today have tried an illicit drug by the time they near high school graduation."[4]

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[2] Substance Abuse & Mental Health Services Admin., *Results from the 2005 National Survey on Drug Use & Health: National Findings* ("*2005 NSDUH*") at 46 (Office of Applied Studies, NSDUH Series H-30, DHHS Pub. No. SMA 06-4194), available at http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5Results.htm.

[3] L.D. Johnston, *et al.*, *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2005* ("*2005 MTF Overview*") at 5 (NIH Pub. No. 06-5882), available at http://www.monitoringthefuture.org/pubs/monographs/overview2005.pdf. Monitoring the Future is an ongoing study of the behavior and attitudes towards drug use of American secondary school students, college students, and young adults. Begun in 1975, the study is funded by research grants from the National Institute on Drug Abuse, which is part of the National Institutes of Health. The 2005 study was conducted by researchers at the University of Michigan's Institute for Social Research.

[4] *Id.* (emphasis added).

Unfortunately the problem is deeper than students experimenting once or twice. Thirty-eight percent of high school seniors have used drugs within the last year, and 23% *within the last month.*[5] Particularly alarming for school officials, 4.5% of high school students reported that they had used marijuana in the last month *on school property*, and 25% reported that drugs had been offered to them (or by them) at school in the past year.[6]

In Alaska, the teen drug problem is particularly severe, and especially with marijuana. Among Alaska teens ages 12 to 17, past-month drug use is a staggering 14.6%, the second-highest rate in the country.[7] Sixty percent of Juneau students have used marijuana by the time they graduate from high school.[8] And among high school students, 6.5% reported using marijuana on school property within the last thirty days, and 13.1% reported that they had used marijuana for the first time *before* they turned 13.[9]

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[5] *Id.* at 48, 52. The national incidence of marijuana use alone is 44.8% by twelfth grade. *Id.* at 44.

[6] Centers for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States 2005*, 55 MMWR Surveillance Summaries No. SS-5 at 19 (June 9, 2006), available at http://www.cdc.gov/mmwr/PDF/ss/ss5505.pdf.

[7] See Substance Abuse & Mental Health Services Admin., *State Estimates of Substance Use from the 2003-2004 National Surveys on Drug Use and Health* at Appendix B, Table B.1 (Office of Applied Studies, NSDUH Series H-29, DHHS Pub. No. SMA 06-4142), available at http://www.oas.samhsa.gov/2k4state/pdf/2k4state.pdf. In addition to ranking second in youth drug use, Alaska has the highest rate of *overall* drug use (that is, by all residents ages 12 and up), at 11.79%. *Id.*

[8] Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002, reprinted at Joint App. 110-16.

[9] Alaska Dep't of Health & Social Services and Alaska Dep't of Educ. & Early Development, *Alaska Youth Risk Behavior*

2. This Court has recognized the troubling implications of drug use at such an early age:

> "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."

Veronia Sch. Dist. 47J v. *Acton*, 515 U.S. 646, 661-62 (1995) (internal citations and quotation marks omitted).

As this Court noted just five years ago, moreover, "[t]he drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse. . . . [T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 834 (2002).

Indeed, although drug use is a scourge at any age, teen drug use is simply devastating. "Drug use, especially in early adolescence, interferes with normal cognitive, emotional, and social development and is closely linked with both psychiatric disorders and delinquency."[10] The problems with marijuana use alone are well-documented: "Short-term risks of marijuana use include traffic accidents and unprotected sex. In addition, marijuana use

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Survey 2003 at 20-21, available at http://www.epi.hss.state.ak.us/pubs/YRBS/2003/YRBS%202003.pdf.

[10] Ann B. Bruner & Marc Fishman, *Adolescents and Illegal Drug Use*, 280 JAMA 597, 597 (1998).

is associated with lack of motivation; greater involvement with and inability to quit other substances; psychiatric problems, including depression, schizophrenia, anxiety, suicide, conduct problems, antisocial behavior, and criminal behavior; and reduced chances of participation and stability in adult roles (eg, dropping out of school, abortion, unemployment, and divorce)."[11]

Unsurprisingly, teens do not handle drug use well. Nearly *half* of all drug-using teens needed treatment for a drug problem in 2005.[12] That means that some 1.3 million children (4.9% of all youths ages 12 to 17) have a serious drug problem, though only a fraction actually receive specialty treatment.[13]

Even worse, our most troubled teens are the ones most plagued by drugs. Rates of substance abuse are more than twice as high among teens who experienced a major depressive episode in the past year (38%) than among teens who have not (18%).[14] Students who used marijuana in the past month were less likely to have an A or B grade average.[15] Youths who used an illicit drug in the past year

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[11] Marianne B.M. van den Bree & Wallace B. Pickworth, *Risk Factors Predicting Changes in Marijuana Involvement in Teenagers*, 62 Arch. Gen. Psychiatry 311, 311 (March 2005) (internal footnotes omitted).

[12] *2005 NSDUH*, *supra* note 2, at 17, 80. By comparison, 38% of *all* drug users 12 years of age and older needed treatment for their drug problem in 2005. *Id.* at 13 (8.1% of persons 12 or older were drug users), 78 (3.1% of persons 12 or older needed treatment for an illicit drug use problem).

[13] *Id.* at 80.

[14] *Id.* at 92.

[15] Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Academic Performance and Substance Use among Students Aged 12 to 17: 2002, 2003, & 2004* (2006),

were almost twice as likely to have engaged in violent behavior as those who did not, and the likelihood of engaging in such behavior increased with the number of drugs a student used.[16] This same pattern is found with marijuana use alone—which is directly correlated with delinquent behaviors, including fighting, stealing, selling drugs, and carrying a handgun.[17]

3. Early intervention is crucial to limiting the damage that drugs cause. Drug use cost our country $180.9 billion in 2002, including $128.6 billion in lost productivity,[18] no small part of which traces back to drug use in adolescence.

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available at http://www.oas.samhsa.gov/2k6/academics/academics.cfm (72.2% of non-users had A or B average; 58.0% of those using marijuana on 1 to 4 days in the past month; 44.9% of those using marijuana on 5 or more days).

[16] Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Youth Violence and Illicit Drug Use* (2006), available at http://www.oas.samhsa.gov/2k6/youthViolence/youthViolence.cfm (49.8% of users versus 26.6% of non-users; 45.6% of users of one illicit drug versus 61.9% of users of three or more illicit drugs).

[17] Substance Abuse & Mental Health Services Admin., *The NSDUH Report: Marijuana Use and Delinquent Behaviors Among Youths* (2004), available at http://www.oas.samhsa.gov/2k4/MJdelinquency/MJdelinquency.cfm. For example, when asked whether they had attacked someone in the past year with the intent to cause serious injury, 5.9% of youths with no past-year marijuana use answered yes, compared to 11.4% of youths who used marijuana 1 to 11 days in the past year, 21.1% of youths who used 50 to 99 days, and 32.9% of youths who used 300 or more days. *Id.*

[18] Office of National Drug Control Policy, *The Economic Costs of Drug Abuse in the United States, 1999-2002* (Dec. 2004) (Executive Office of the President, Pub. No. 207303), available at http://www.whitehousedrugpolicy.gov/publications/economic_costs.

Once a child uses drugs, the risk of continuing to use illicit substances throughout adolescence and into adulthood increases dramatically. Children who use marijuana for the first time before they turn 15 are more than *five times as likely* to find themselves in trouble with drugs as adults than if they had not used marijuana until at least 18 years of age.[19] And in one study, 73% of teens who used marijuana regularly, and 55% of those who tried it experimentally, *were still using the drug one year later*.[20]

Indeed, the strongest predictors of marijuana use by teens are past substance use by themselves and their peers; delinquency; and problems in school.[21] This "suggests that the greatest opportunities for intervention are during earlier stages of marijuana involvement. During later stages, genetic and other biological factors involved in habituation and dependence may become increasingly important and treatment, more difficult."[22]

4. In fighting student drug use, norm-reinforcing messages are crucial. Students are more likely to use drugs if they do not think drugs are dangerous. And when students' collective perception of the risks of drug use change—for better or for worse—rates of student drug use quickly follow.[23] When it comes to illegal drugs, it is no

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[19] *2005 NSDUH*, *supra* note 2, at 69 ("In 2005, among adults aged 18 or older who first tried marijuana at age 14 or younger, 13.3 percent were classified with illicit drug dependence or abuse, higher than the 2.4 percent of adults who had first used marijuana at age 18 or older.").

[20] Van den Bree & Pickworth, *supra* note 11, at 315.

[21] *Id.* at 315, 317.

[22] *Id.* at 317 (internal footnote omitted).

[23] *2005 MTF Overview*, *supra* note 3, at 12 (a change in high school students' perception of the risk of marijuana use predicts a change in actual use in subsequent years); see also L.D.

surprise that a high school senior is more likely to share the attitudes of his peers than those of his parents.[24] At the same time, while they are susceptible to their peers' opinions about drugs, students *do* respond to anti-drug messages. Marijuana use, for example, is far less severe among youths who perceive strong disapproval from their parents.[25]

In fact, the research shows that schools have a particularly important role to play in providing an atmosphere conducive to healthy decision-making. Drug and alcohol use is less pervasive among students who report being exposed to drug or alcohol prevention messages at school than it is for those who do not recall being exposed to anti-drug messages.[26] And one study recently determined that, quite simply, "*[s]tudents are more likely to use substances when the norms in school reflect a greater tolerance for substance use.* These

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Johnston, *et al.*, *Monitoring the Future National Survey Results on Drug Use, 1975-2005. Vol. I: Secondary School Students* ("*2005 MTF*") at 391-92 (NIH Pub. No. 06-5883), available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2005.pdf. Student drug use has been on a gradual decline the past several years, though there is an ominous indication in the 2005 data suggesting that this trend may be changing. See *2005 MTF Overview*, *supra* note 3, at 5 ("The 8th graders have been the first to show turnarounds in illicit drug use: they were the first to show the upturn in use in the early 1990s and the first to show the decline in use after 1996; they now appear to be the first to show an end to the declines observed in recent years.").

[24] *2005 MTF*, *supra* note 23, at 390, 425-27.

[25] *2005 NSDUH*, *supra* note 2, at 62 ("Current marijuana use [*i.e.*, within the last 30 days] also was much less prevalent among youths who perceived strong parental disapproval for trying marijuana or hashish once or twice than for those who did not (*4.6 vs. 27.0 percent*).") (emphasis added).

[26] *Id.* at 65 (past month use of illicit drugs for youths ages twelve to seventeen, 9.2% vs. 13.2%).

findings hold even after controlling for students' own disapproval and for other student and school demographic characteristics."[27] This means that by creating an "environment of disapproval of substance use," schools can influence not only how students *think* about using illicit substances, but also how they *feel* about doing drugs.[28]

In short, in the fight against teen drug use, it is clear that "[s]chools can make a difference. School administrators, teachers, and students can all work together to create an environment where substance use is actively disapproved."[29]

But to foster this protective environment, school officials must not be required to stand silently by while students advocate illegal drug use. They must be permitted to adopt and enforce a policy that prohibits students from promoting the use of illegal drugs.

II. The Ninth Circuit's First Amendment Analysis Is Unworkable And Wrong Because It Undermines Legitimate Anti-Drug Policies And Forces Schools To Tolerate Offensive Speech.

The Ninth Circuit's decision seriously, and erroneously, undermines our schools' ability to carry out vital anti-drug policies. Under the Ninth Circuit's

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[27] Revathy Kumar, *et al.*, *Effects of School-Level Norms on Student Substance Abuse*, 3 Prevention Sci. 105, 121 (June 2002) (emphasis added) (studying marijuana use, daily cigarette smoking, and heavy alcohol consumption).

[28] *Id.* at 121-22.

[29] *Id.* at 122; see also van den Bree & Pickworth, *supra* note 11, at 316 ("Schools can play a role in shaping the development of socially approved conduct, and active discouragement of substance use in schools can be effective.") (internal footnotes omitted) (study of risk factors related to adolescent marijuana use).

approach, school officials may not interfere unless and until a particular instance of pro-drug advocacy causes an immediate, palpable, and severe disturbance—and only during an "educational and curricular" activity, no less. As we now show, this standard seriously compromises the ability of our public schools to promote a drug-free environment. And it has no basis in this Court's First Amendment decisions, which clearly do not require a school to tolerate student speech advocating illegal drug use.

A. The Ninth Circuit's Standard Will Not Allow School Officials To Respond Effectively To Disruptive Speech.

The impact of the Ninth Circuit's decision on school officials' ability to promote a drug-free environment is well illustrated by the facts of this case. Here, Frederick unfurled a fourteen-foot banner reading "BONG HITS 4 JESUS" at a school event, and Principal Morse intervened to enforce school board policies expressly prohibiting student advocacy of illegal drug use.[30] The Ninth Circuit's condemnation of Principal Morse's actions under these circumstances demonstrates that the court has adopted a completely unworkable standard of conduct for school officials charged with responding to potentially disruptive student speech.

1. In contrast to *Tinker*, where "the wearing of armbands . . . was entirely divorced from actually or

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[30] See Juneau School Board Policy 5520, reprinted at Pet. App. 53a-54a (prohibiting "any assembly or public expression that . . . advocates the use of substances that are illegal to minors"); Juneau School Board Policy 5721, reprinted at Pet. App. 54a-57a (prohibiting distribution on school premises of materials that "advocate the use by minors of any illegal substance or material"); Juneau School Board Policy 5850, reprinted at Pet. App. 58a ("Pupils who participate in approved social events and class trips are subject to district rules for student conduct . . . .").

potentially disruptive conduct by those participating in it," 393 U.S. at 505, Frederick's display of the banner here caused an immediate disturbance that Principal Morse was fully justified in stopping. The court's search for an additional disruption beyond the banner itself was unnecessary. As this Court has held, "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513.

And even if the display of the banner was not sufficient *actual* disruption, schools are not required to tolerate "interference, actual *or nascent*, with the schools' work or of collision with the rights of other students . . . ." *Id.* at 508 (emphasis added). Here, the school's well-founded fear of increased student drug use is ample justification for the school's policy of not tolerating any student speech like Frederick's. The risk of increased drug use makes such advocacy a "material and substantial interference with schoolwork or discipline." *Id.* at 511; see also *Williams* v. *Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980) (concluding that judicial notice should be taken that "encouraging the use of drugs encourages actions which in fact endanger the health or safety of students").

The decision below is unworkable for another reason as well: it requires school officials to evaluate each instance in which a student advocates breaking the law to determine whether *that* particular speech is likely to substantially disrupt the school's educational mission. But this requirement would make it impossible for school officials to adopt and enforce policies to address the cumulative effect of pro-drug messages.

If permitting such messages would disrupt the work of schools in educating our children and protecting their health—and these *amici* can attest that it would—then

public schools must be allowed to act even where the disruptive effect of a single incident is not palpable. This need could hardly be clearer than it is here, where Frederick's "BONG HITS" banner was at least temporally, and perhaps causally, linked to incidents of pro-drug graffiti in the high school after the event.

Worse still, the decision below adopts a totally unworkable standard for determining whether a particular disciplinary measure is appropriate. Here the Ninth Circuit concluded that confiscating Frederick's banner was not necessary because his speech caused no *further* disruption (beyond the pro-drug graffiti, of course). But that is simply because Principal Morse took action immediately, before further disruptions occurred. A standard that treats a *successful* intervention as proof that an intervention was *unnecessary* makes no sense.

To the contrary, Principal Morse should not have been required to wait for Frederick or one of his classmates to take a "bong hit" before she could lawfully confiscate Frederick's banner. Nor should she have been required to wait and see whether Frederick's fellow classmates would start a ruckus. First Amendment rights—and liability for their breach—should not turn on whether a group of volatile teenagers is well-behaved at a particular moment.

2. This Court should likewise reject the Ninth Circuit's arbitrary distinction between activities that are "educational and curricular," and activities that are not. That distinction is captured in the lower court's statement that "[o]ne can hypothesize off-campus events for which the students might be released that would be educational and curricular in nature *and would be disrupted by school speech such as Frederick's*. . . . But a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event." Pet. App. 12a (emphasis added).

Distinguishing school activities in this way conflicts with this Court's understanding of the educational process: "The process of educating our youth for

citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Fraser*, 478 U.S. at 683. If an activity is school-sponsored and faculty-supervised, it should not matter whether it is held entirely on school property or, as here, partly on and partly off campus. Nor should it matter whether the activity is considered fun or boring by the students.

In addition, neither the schools nor the courts can fairly administer the Ninth Circuit's line. Schools cannot be expected to determine whether a particular field trip or activity is or is not "curricular." Where do "extra-curricular" events fall? Are the free speech rights of the students in the math club different from those of students on the traveling basketball team? What about student participants as compared to student spectators? Can officials treat a visit to an amusement park the same as a trip to a national monument? If not, is a trip to the zoo more like the park or the monument?

Even if some sort of classification system is conceivable, it makes no sense to require school officials to refrain from enforcing standard school policies if they determine—or fear that a *court* would determine—that an activity is more recreational than educational. Advocating illegal drug use is no less serious because a school-sponsored, faculty-attended event falls on one side or the other of this line.[31]

In all events, overseeing a typology of school-related activities is not the proper role for the courts. This Court

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[31] The impossibility of administering such a distinction is further demonstrated by the Ninth Circuit's treatment of the Olympic Torch Relay, a major international event. Contrary to the decision below, Coca Cola's support for that event did not diminish its scholastic value. Corporate sponsorship is ubiquitous for sporting events and cultural activities of all sorts, from the Olympics, to a city's concerts-in-the-park program.

has repeatedly stated that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273 (citing cases); see also *Fraser*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); *Bd. of Educ.* v. *Pico*, 457 U.S. 853, 863 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."); *Tinker*, 393 U.S. at 507 ("the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools").

The Ninth Circuit's arbitrary isolation of "curricular activities" improperly shifts authority from school officials to the federal courts. Regulating student conduct is a task for our schools, school officials, and the parents and citizens who operate the school boards, not the federal judiciary.

B. Schools Are Entitled To Prohibit Student Speech That School Officials Reasonably Believe Is Plainly Offensive To The Educational Mission.

Fortunately, this Court's First Amendment decisions not only offer no support for the Ninth Circuit's analysis, they affirmatively refute it.

1. Foremost, the Court has long held that the First Amendment does not protect "plainly offensive" messages that tend to promote disruption and diversion in our public schools. See *Fraser*, 478 U.S. at 683. In holding that Frederick had a constitutional right to display his banner, the decision below violated the fundamental principle running through this Court's student speech cases that "[a] school need not tolerate student speech that

is inconsistent with its 'basic educational mission.'" *Kuhlmeier*, 484 U.S. at 266.

The Ninth Circuit acknowledged this principle but misapplied it when it argued that "[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' the way sexual innuendo is." Pet. App. 9a. To the contrary, advocating that one's classmates engage in illegal drug use—which is what Principal Morse and the Ninth Circuit believed Frederick's banner was doing, see *id.* at 6a-7a—is *at least* as offensive to the school's educational mission and the health of Frederick's classmates as the phallic metaphor at issue in *Fraser*. In fact, the decision below itself exemplifies the perception that the Juneau School Board policy is designed to combat: that illegal drug use by high school students is no big deal.[32]

In short, the Ninth Circuit recognized that *Fraser* permits the restriction of "plainly offensive" speech that promotes diversion from the educational process, particularly for adolescents. See Pet. App. 16a-17a n.44. But the court effectively limited *Fraser* to its facts, holding that it only permits schools to prohibit sexually lewd or vulgar messages. *Id.* at 9a. That was error. This strict cabining of the "offensive" speech category is flatly contrary to the rationale of *Fraser*. See also *Boroff* v. *Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000); *Williams*, 622 F.2d at 1205-06 (pre-*Fraser* decision holding that disruption was not necessary for school to ban advertisement encouraging drug use). *Fraser* is not about social *sensibilities*; it is about the unique needs and

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[32] Even if Alaska law were as "complicated" as the Ninth Circuit thought, Pet. App. 6a n.4—and it is not—the "issue of 'illegal' drug use" is *not* complicated under federal law. Cf. *Gonzales* v. *Raich*, 545 U.S. 1 (2005). Frederick has never claimed that he was making a political statement about legalization. Rather, he was trying to cause a disturbance and get attention by advocating illegal drug use.

susceptibilities of minor students. That is, under *Fraser* the First Amendment permits schools to restrict speech simply because it poses more of a danger to immature students than to mature adults. See 478 U.S. at 683 ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.").

That is true here. "Research has shown that the key risk periods for drug abuse occur during major transitions in children's lives."[33] Children are likely to encounter drug abuse for the first time during adolescence, as they move into the greater social and academic pressure of middle school.[34] "Then, when they enter high school, young people face additional social, psychological, and educational challenges. At the same time, they may be exposed to greater availability of drugs, drug abusers, and social engagements involving drugs."[35]

Pro-drug speech is particularly distracting, and dangerous, to students. When it comes from their peers, this is the kind of speech that students are likely to heed. If left unanswered by school officials, moreover, such speech may be the *only* speech other students hear. And speech advocating drug use is every bit as harmful to students as sexually suggestive remarks. At a minimum, public school officials are entitled to think so; they have every right not to look the other way when a student at a school-sponsored event advocates illegal drug use.

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[33] Elizabeth B. Robertson, *et al.*, *Preventing Drug Use Among Children and Adolescents: A Research-Based Guide for Parents, Educators, and Community Leaders* at 9 (2d ed. 2003) (NIH Pub. No. 04-4212(A)), available at http://www.drugabuse.gov/pdf/prevention/RedBook.pdf.

[34] *Id.*

[35] *Id.* at 10.

2. The decision below also flies in the face of this Court's repeated admonition that the responsibility for educating our children lies with school officials. The Ninth Circuit's crabbed reading of *Fraser* and its non-deferential review of Principal Morse's analysis of what constitutes "plainly offensive" speech oversteps the limited role that courts ought to play in the administration of public school education. The decision below does not even *mention* the deference owed to school board policies and to the decisions of the school officials who apply those policies. Rather, it proceeds on the assumption that courts, rather than schools, have the exclusive say on what manner of speech is "plainly offensive" to the educational functions of the public schools.

Indeed, the difference between school authorities and other government instrumentalities seems to have escaped the Ninth Circuit's notice. "Public schools," the court wrote, "are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself." Pet. App. 12a. This simplistic analysis ignores the fact that school authorities act *in loco parentis* and must be permitted enough discretion to fulfill that function. As this Court observed in *Davis Next Friend LaShonda D.* v. *Monroe County Board of Education*, "'the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'" 526 U.S. 629, 646 (1999) (quoting *Veronia*, 515 U.S. at 655). Indeed, "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Veronia*, 515 U.S. at 662.

The Court recognized in *Fraser* that school authorities must be allowed "to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." 478 U.S. at 684. The same is

true for student speech advocating the use of illegal drugs. This amount of control is essential for our schools to fulfill their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Kuhlmeier*, 484 U.S. at 272 (quoting *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954)); see also *Fraser*, 478 U.S. at 686 ("I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.") (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

Here, had Principal Morse failed to react to Frederick's inappropriate display, she would have foregone an opportunity to teach her students—including Frederick—that they should be law-abiding citizens. And she would have failed to protect her students from further exposure to a harmful message.

As these *amici* know from first-hand experience, the legitimacy of the anti-drug imperative is by now beyond question. Drugs are highly destructive to the learning environment and, as discussed above, social norms are vital to combating drug use, particularly at the high school level. Preventing student drug use—what the decision below wrongly dismissed as "a vaguely-defined 'educational mission,'" Pet. App. 16a—is embodied in concrete policies in place at most public schools, and in federal anti-drug and educational funding laws that shape school curricula.[36] These laws were enacted, and the policies of the Juneau School Board adopted, to deal with

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[36] See, *e.g.*, 20 U.S.C. § 7114(d)(6) (requiring school districts funded by the Safe and Drug Free Communities Act to periodically certify that their programs "convey a clear and consistent message" that illegal drug use is "wrong and harmful.").

the very real and substantial drug problem facing our schools and our children. These types of interests—and public school officials' assessment of them—are a necessary part of the First Amendment analysis in cases like this one.

III. The Ninth Circuit's Decision Rests On A Fundamental Misunderstanding Of Qualified Immunity.

Perhaps the most startling aspect of the decision below is the holding that the school officials here can be *personally* liable for their actions based upon the court's cavalier assertion that the free speech rights it strained to recognize were "clearly established." Having held that *general principles* gleaned from factually-dissimilar cases established Frederick's right to display a "BONG HITS" banner, the Ninth Circuit then concluded that Principal Morse's immunity defense should fail because a reasonably competent public official is expected to know the law and how to apply that law to her conduct. Pet. App. 21a.

But this reasoning rests on a fundamental misunderstanding of qualified immunity. The whole point of the qualified immunity analysis is to determine whether a public official's mistake of law is reasonable. "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier* v. *Katz*, 533 U.S. 194, 105 (2001). Put another way, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Principal Morse's decision was not "plainly incompetent." She reached a reasoned, and reasonable, conclusion that Frederick's banner was "inconsistent with the district's basic educational mission to promote a

healthy, drug-free life style," and that she had to enforce school policy prohibiting Frederick's message as part of the "district's responsibility to teach students the boundaries of socially appropriate behavior." Pet. App. 3a (quoting Petitioners' interrogatory answers). Even if Frederick's speech is protected under the particular circumstances of this case—and it is not—Principal Morse is entitled to qualified immunity.

The Ninth Circuit's decision to the contrary—that a newly proclaimed judicial gestalt is "clearly established" constitutional law—is as dangerous as it is wrong. It is obvious that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987).

Indeed, in the context of public school education, the costs of an improperly calibrated qualified immunity standard go well beyond the financial. Among other things, it puts at risk the health of our students. If the threat of litigation intimidates school officials into tolerating student advocacy of illegal drug use, more students are likely to engage in more unhealthy behavior. Moreover, the increased threat of litigation is likely to force school officials to be more tolerant of disruptions in and around the classroom, making public school education less effective and resulting in students entering the world less prepared than they could have been.

The interests underlying anti-drug policies—and many other school policies—are too important for school officials to be over-deterred by the threat of personal liability for any misstep. Public schools must be allowed to promote a drug-free environment and cultivate their students' fullest potential, which means that school officials must be free to make reasonable judgments to enforce reasonable school

policies under novel circumstances. Any other rule would be unfair to school officials and detrimental to students.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A

D.A.R.E. America is a nonprofit organization that supports the drug resistance efforts of communities nationwide. The D.A.R.E. (Drug Abuse Resistance Education) program is a police officer-led series of classroom lessons that teaches children from kindergarten through 12th grade how to resist peer pressure and live productive drug and violence-free lives. The D.A.R.E. program is implemented in 75% of our nation's school districts and more than 43 countries worldwide. D.A.R.E. America provides officer training and student educational materials, and supports the development, implementation, and evaluation of the D.A.R.E. curriculum.

Drug Free America Foundation, Inc. ("DFAF") is a nonprofit drug prevention and policy organization committed to policies and laws that will reduce illegal drug use, drug addiction, drug-related injury, and death. DFAF has formed several divisions to further this goal, including the *International Science and Medical Forum on Drug Abuse*, which reviews current articles and published research and provides the public with scientific knowledge about narcotics in an understandable form; the *Institute on Global Drug Policy*, an alliance of physicians, scientists, attorneys and drug specialists who advocate public policies to curtail the illegal use of alcohol or harmful drugs; and *Students Taking Action Not Drugs*, a DFAF division comprised of college students concerned about drug and alcohol abuse at college campuses who provide information to their peers about the dangers of drugs, and help direct young people into treatment.

National Families in Action is a nonprofit organization whose mission is to help families and communities prevent drug abuse among children by promoting strategies based on science and law. With Wake Forrest University School of Medicine, the organization co-sponsors the Addiction Studies Program for Journalists and the Addiction Studies Program for State Legislatures. In 2003, it began the Parent Corps,

patterned after the Peace Corps, which recruits, trains, employs, and supervises Parent Leaders. Each Parent Leader works out of his or her child's school to educate and mobilize the school's parents into preventing the use of alcohol, tobacco, and illegal drugs among students. In the pilot program, 20 Parent Leaders in 19 schools in nine states have recruited 11,500 members: 6,500 parents in the Parent Corps and 5,000 students in the Youth Corps, founded at the request of students.

Save Our Society From Drugs ("S.O.S.") is a nonprofit organization committed to establishing, encouraging and enabling drug laws and drug policies that reduce illegal drug use and abuse, drug-related injury, and death. S.O.S. has been involved in opposing and educating citizens about state ballot initiatives and legislative measures to legalize drugs.

The Honorable William J. Bennett served as United States Secretary of Education from 1985-1988 and he was the first Director of the White House Office of National Drug Control Policy, serving in that post from 1989-1990. Dr. Bennett also served as chairman of the National Endowment for the Humanities from 1981-1985. He has written and edited 16 books, including *The Book of Virtues*, *The Children's Book of Virtues*, and the first of a two-volume history, *America: The Last Best Hope*. Dr. Bennett is also the host of a nationally broadcast radio show, "Bill Bennett's Morning in America."

General Barry R. McCaffrey served as Director of the White House Office of National Drug Control Policy from 1996-2001, a tenure longer than any of his predecessors. He was confirmed for this position by unanimous vote by the U.S. Senate. For this period of public service, General McCaffrey received many honors including: the United States Department of Health and Human Services' Lifetime Achievement Award for Extraordinary Achievements in the Field of Substance Abuse Prevention, the United States Coast Guard

Distinguished Public Service Award, the Norman E. Zinberg Award of the Harvard Medical School, the Federal Law Enforcement Foundation's National Service Award, and the Community Anti-Drug Coalitions of America Lifetime Achievement Award. Prior to serving as the nation's Cabinet Officer for U.S. drug policy, General McCaffrey served in the United States Army for 32 years and retired as a four-star General. At retirement he was the most highly decorated serving General, having been awarded three Purple Heart medals for wounds received in his four combat tours, as well as twice awarded the Distinguished Service Cross, the nation's second highest award for valor. He also twice was awarded the Silver Star for valor.

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No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE, ET AL., *Petitioners,*

v.

JOSEPH FREDERICK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE DRUG POLICY ALLIANCE AND THE CAMPAIGN FOR NEW DRUG POLICIES AS *AMICI CURIAE* SUPPORTING RESPONDENT

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STATEMENT OF INTEREST*

The Drug Policy Alliance (DPA) is dedicated to broadening the public debate over drug use and regulation and to advancing realistic policies, grounded in science, compassion, public health, and respect for human rights. A non-profit, non-partisan organization with more than 20,000 members and active supporters nationwide, the Alliance has played a central role in the movement for drug law reform in this country, raising public awareness of the inadequacies of current measures and identifying and galvanizing support for promising alternatives.

The Alliance has a core, abiding commitment to preventing adolescent substance abuse and assuring that young people who develop drug problems receive proper assistance. In recent years, the Alliance has worked with government officials, parents' groups, and experts to develop effective and realistic prevention strategies and advocate for proven interventions.

The Campaign for New Drug Policies (CNDP) is a non-profit organization devoted to reforming State policies toward illicit drugs, with an emphasis on healthcare responses to drug-related problems. A forerunner organization, Americans for Medical Rights (AMR), now a project of CDNP, was chartered to advocate for the legal, medical use of marijuana, and through their advocacy efforts, CNDP and AMR have advanced enactment of ballot measures in 12 States and the District of Columbia.

As participants in the earnest and often emotionally-charged debate about drug policy reform – and frequent critics of government policies and enforcement efforts – *Amici* are deeply concerned that this case be decided consistently with the First Amendment's core commitment to public discussion

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*The parties have consented to the filing of this brief. It was not authored in any part by counsel for a party, and no one other than *Amici* and their counsel made a monetary contribution for its preparation or submission.

SUMMARY OF ARGUMENT

Although the incident giving rise to this case may seem trivial, the First Amendment principles that have now been drawn into question are not. In an effort to uphold punishment imposed here for Respondent's nondisruptive expression in a public forum, Petitioners advance a fateful First Amendment argument: that because federal law proscribes marijuana, any expression that might have the effect of weakening its audience's compliance with the statutory prohibition – whether a "BONG HiTS 4 JESUS" banner, one that says "legalize marijuana," or one that lays out a more elaborate case against existing law – is punishable based on these "bad tendencies."

This theory has been decisively repudiated by this Court before and must be here. As landmark opinions have explained, a "bad tendencies" rule systematically disadvantages those who criticize existing laws, thereby entrenching the unexamined status quo, and it has no place in a system of government based on popular sovereignty and public discussion. This realization, however, did not come easily; the theory has a long and notorious history – and was at the center of the bitter controversies over the right to speak against slavery that helped impel the Nation toward Civil War.

The commitment to resolving matters through open public debate – and appreciation for the dangers of viewing speech suppression as an auxiliary means of law enforcement – are of central relevance to the subject matter of this case. In recent years, citizens across the country have been engaged in a serious, robust and wide-ranging discussion about the Nation's present approach to drug use and abuse. Voters and legislators have debated whether marijuana possession should remain regulated under the criminal law; whether laws should exempt drug use for medical or religious purposes; whether laws mandating lengthy sentences for nonviolent offenders are sensible and fair; whether rules impeding the availability of effective pain medications to individuals with chronic and

intractable pain should be changed; and whether the need to combat infectious disease warrants changing laws intended to prevent drug users from obtaining sterile syringes. Many of these measures have been enacted, often with broad citizen support, typically over the vocal opposition of government authorities, and almost always after long and intense debate.

This is not the occasion to argue the merits of the reform positions on various policies, but rather to highlight the radical incompatibility of Petitioners' position with the Constitution's core commitment to open debate. When policy reforms are discussed, opponents in law enforcement invariably claim that measures will have unintended consequences and weaken compliance with other laws. To date, however, such claims, advanced in the forum of public opinion, have been subject to scrutiny and counter-argument. Under a "bad tendencies" theory, assertions that have been matters for disproof or rebuttal become a valid basis for silencing the disfavored speech.

Nor is this danger particular to debates over drug control laws. Those who seek to change laws outlawing physician-assisted suicide, gun controls, or constitutional abortion protection necessarily believe – and seek to persuade others – that the existing laws are unwise or unjust. Petitioners' theory would have condemned advocacy of the 21st Amendment as readily as it condemns present reform proposals.

To be sure, the expression in this case – a banner bearing words whose precise meaning remains elusive – was not a closely reasoned law reform argument. The logic of Petitioners' position does not admit a distinction on that basis. On the country, a statement cogently laying out scientific data inconsistent with the government's harm message could have a greater effect than did Frederick's banner display as presumably would a "legalize marijuana" banner exhibited by a revered recent JDHS graduate. Indeed, the United States as *Amicus* does not shy away from this implication, and expressly disavows any suggestion that political advocacy should be

exempt from tendency-based suppression.

Petitioners do not claim here that government could punish the speech by non-student advocates of drug policy reform. Rather, citing *Tinker* and *Fraser*, they claim authority "only" to stop public high school students from speaking on the government-disfavored side of this debate. By their own terms, those decisions rest exclusively on the need to adapt First Amendment rules to the special circumstances of the public school environment – not, as Petitioners suggest, that the freedom of belief and expression the Amendment protects do not attach until the age of majority. Both history and precedent rebel against that claim. Students have been active participants in urgent national debates over war and civil rights, as they are in the discussion of drug policy reform, and, given their distinct perspective on many of the most important issues, society has a strong interest in hearing from them.

The rules announced in *Tinker* and *Fraser* simply have no application to Frederick's First Amendment claims because, as we argued (unsuccessfully) as *amicus curiae* below, Respondent was not speaking as a student in a school-provided forum. He was addressing the public from a public sidewalk, a forum where, under this Court's precedents, freedom of expression is given its most comprehensive protection. There is no question that if any of the other people standing in that same place had displayed an identical banner, any attempt to suppress *their* speech would be judged – and condemned – under an undiluted strict scrutiny standard. There is no valid First Amendment reason why Frederick, present with them by right, wholly independent of his status as a public high student – could more readily be silenced.

But even if the Court were to allow Petitioners' actions an exception from the ordinary rules governing censorship in a public forum, the "school speech" decisions recognize no permissible basis for the punishment here. Contrary to Petitioners' rereading, *Tinker* and *Fraser* recognize that

suppressing speech based on disapproval of the idea expressed – viewpoint discrimination – to be no less serious "inside the schoolhouse gate" than outside. As this Court's landmark public school First Amendment decision, *West Virginia Bd. of Educ. v. Barnette*, makes clear, whether or how "central" Petitioners' drug prevention is to their "mission" does not control; school authorities' unquestioned power to teach students about the dangers of illegal drugs or the dangers of global warming – does not include the power to suppress expression by students who believe otherwise.

While Petitioners and *Amici* call the Court's attention to the vastness, complexity and seriousness of the problem of youth drug abuse, implying that adherence to First Amendment principles – the remedy for speech is "more speech" – in these circumstances would be an unaffordable luxury, any such "special needs" exception should be rejected. There are strong reasons for adhering to First Amendment doctrine – developed in war, civil emergency, and upheaval – in any circumstances, but the conflict posited here is not authentic. No searching scrutiny is needed to see that the only purpose the power Petitioners' claim can *actually* serve is as a signal of the steadfastness of their commitment to the anti-drug cause; it bears no reasonable relationship (save for, perhaps, an inverse one) to actual drug abuse prevention. Whether or not "pro-drug" messages "lead to" drug abuse and even if Respondent's inscrutable banner could be so described, the government would have scant authority to suppress other, similar (or more "incendiary") *banners* visible to these high school students, and none at all to interfere with the many other messages that Petitioners themselves acknowledge "bombard" teenagers.

Under First Amendment law, the patent inefficacy of censorship in advancing the governmental interest settles its unconstitutionality. But the reasons for rejecting Petitioners' argument are not confined to its First Amendment dangers. At least as important, censorship here is a profoundly bad drug

abuse prevention strategy. To legislators, school authorities, and parents concerned about youth drug abuse, every message the government can send that drugs are harmful and every contrary one it can suppress may seem a step in the right direction, but experience belies that intuition. Because schools cannot talk to students through a "closed circuit"; because students receive so much other drug-related information, an alarmist approach, which lacks candor and credibility, does not work.

This case, however, is not about what public school authorities should or may say – but rather what they may suppress, and a "drug abuse prevention" policy that aims to inhibit students from expressing what they actually know, believe, or think about drug-related matters, in favor of what the government wants to hear, is doomed.

ARGUMENT

I. The Constitution Requires and The Nation Benefits From Open and Unhindered Discussion of Drug Policy Reform

A. The "Bad Tendency" Theory of Censorship Offends Constitutional First Principles

Although the Briefs of Petitioners and their *Amici* repeatedly describe this case as involving punishment for "advocating" violation of the federal drug laws, see Pet. Br.8, the expression in this case bears no resemblance to the speech that has given rise to this Court's incitement case law, see, *e.g.*, *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982); *Bond v. Floyd*, 385 U.S. 116 (1966), and the theory of censorship they assert goes far beyond what has been held permissible even in those circumstances.[1] Frederick's expression – a banner bearing a cryptic message that *Petitioners* have described as a "whimsical espousal[] of illegal drug use"

[1]The Court has held that speech unequivocally advocating unlawful action is protected, subject to a narrow and stringent set of exceptions. See *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1967) (unlawful action must be serious, imminent, and highly likely).

and "at best * * * a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs." C.App.Br. at 21 – was "incitement" only in the sense that "[e]very idea is an incitement," *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

What Petitioners here call "illegality promot[ion]," Br. 15, reduces to a claim that (1) marijuana use is prohibited under federal law; (2) Frederick's inclusion of a slang and seemingly sympathetic drug reference is at odds with that law's underlying premise, *i.e.*, that drug use is "harmful and wrong," and (3) statements of this character could comfort those who might smoke marijuana, in violation of the prohibition. That Respondent did not intend the message to incite others to unlawful action, Petitioners maintain, does not diminish their power to suppress it, nor would it matter that the banner contained a more explicitly political appeal or only truthful, factual information.[2]

The idea that government officials are empowered to punish expression on these broad terms has a long history, see CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000) 10-12, but it is one whose dangers to core constitutional values this Court has come to emphatically repudiate.

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[2] As the efforts of the parties and courts below make clear, divining what the message meant is no easy matter; apparently, many who observed the banner in January 2002 found it unintelligible. But there is agreement that Frederick's intended audience were those watching on television. Pet. App. 62a – *not* the high school students whose noncompliance with the law he is charged with "inciting," and the only "effect" Petitioners have even attempted to connect to the banner was an instance of pro-drug *graffiti*.

For his part, Respondent testified that inclusion of a reference to drugs (as against some other controversial topic) was in some sense fortuitous. The primary purpose of the exercise, he explained, was to "reassure myself that this is America. I have a Bill of Rights. I have the right to do something, whether [] somebody finds it offensive or somebody doesn't agree with it."

Punishing those who criticize laws is contrary to what Justice Jackson described as the "American concept of the State," – "where [a]uthority * * * is to be controlled by public opinion, not public opinion by authority," *Barnette*, 343 U.S. at 641. It gives would-be censors vast power, see, *e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 580 (2001) (Thomas, J., concurring in part) ("if speech may be suppressed whenever it might inspire someone to act unlawfully, then there is no limit to the State's censorial power"), and, because every "denunciation of existing law tends in some measure to increase the probability that there will be violation of it," *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), it operates to the systematic disadvantage of those seeking to persuade fellows citizens to change the status quo. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

As Judge Kleinfeld's opinion below was quick to recognize, this theory does not limit itself to speech critical of the Nation's *drug* laws. What *Washington v. Glucksberg*, 521 U.S. 702 (1997), described as the "earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide," *id.* at 735, has unfolded in an environment where criminal prohibition is almost universal, *id.* at 711-16, and the recognition that this "debate [should] continue * * * in a democratic society," *id.* at 735 was made with full awareness that such discussion – by exposing apparent weaknesses in the justifications for current prohibitions – could lead to noncompliance. The same might be said about arguments that federal gun control laws violate the Second Amendment; arguments against federal abortion clinic access statutes; those favoring repeal (prior to *Lawrence v. Texas*, 539 U.S. 558 (2003)) of laws criminalizing homosexual sodomy; or the 1932 Democratic Party platform's condemnation of national alcohol prohibition. See KYVIG, REPEALING NATIONAL PROHIBITION

(2000) at 157.[3] And *Tinker* upheld expression that might readily have been described as "advocating" noncompliance with the law requiring military service. Cf. U.S. Br. 7. Indeed, virtually every basis for arguing that a law should be changed – that it is unjust, philosophically unsound, that it violates the Constitution or some other, higher law, that it is hypocritically or haphazardly enforced – can be said to affect some listener's readiness to comply.

While the wrongness of the "bad tendencies" theory seems so self-evident as to make such dangers seem only theoretical, the judicial opinions famed for exposing its errors were dissents and concurrences, delivered at a time not long after the Court upheld the conviction of Charles Schenck, for sending a flyer to World War I era draftees with the Thirteenth Amendment printed on one side and a denunciation of war printed on another, see 249 U.S. 47 (1919), and when

> Citizens were sentenced to prison terms for telling a woman who was knitting socks for soldiers that no soldier would ever see them * * * for urging broader exemptions for conscientious objectors * * * and for circulating a pamphlet arguing that Christ's principles condemned war.

CURTIS, FREE SPEECH at 390 (summarizing cases collected in CHAFFEE, FREE SPEECH IN THE UNITED STATES (1941)).

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[3]The Court of Appeals made a similar point in rejecting Petitioners' claimed power to punish "mission-undermining" speech.

> All sorts of missions are undermined by legitimate and protected speech – a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime*; a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers; and a school's traffic safety mission would be undermined by a student circulating copies of articles showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents.

Pet.App.11a (footnote omitted).

These wartime prosecutions do not represent an historical aberration or even the high water mark of the "bad tendencies" theory. During the middle decades of the Nineteenth Century, Southern States relied on an increasingly aggressive version of the theory to thwart expression of anti-slavery opinion and prevent debate over even modest measures, on the theory that such discussion tended to undermine bondsmen's acceptance of their "lawful" lot. See CURTIS at 260-99; see also GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 232-34 (2006); W. MILLER, ARGUING ABOUT SLAVERY (1996). This suppression provoked outrage in the North, where accusations that principles of republican government had been supplanted by "Slave Power," and these crises over free speech fueled hostilities that took the Nation into Civil War.

B. The Current Discussion Of Drug Policy Reform Is Tied Inextricably to Principles of Self-Government

These experiences and lessons have resonance in this case. As this Court's recent decisions give some indication, the wisdom, justice, and efficacy of our Nation's drug laws is the subject of a thoughtful, robust debate at every level of government and throughout the country. See *Gonzales v. Raich* 545 U.S. 1, 42 (2005) (O'Connor, J, dissenting) (describing California's Compassionate Use Act as "exemplif[ying] the role of States as [policy] laboratories" pursuing "novel social and economic experiments). A non-exhaustive count identified more than 150 notable reforms enacted at the State level alone (in 46 different States) between 1996 and 2002 – 17 of which became law by voter initiative. See Drug Policy Alliance, *State of the States, Drug Policy Reforms: 1996-2002* (2003). The number of changes at the local government level is far larger, and many measures that did not become law garnered large citizen and legislative support. These continue.[4]

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[4]Petitioners' *Amici* are profoundly wrong to imply (D.A.R.E.Br.18 n.32) that these developments are inconsequential, because marijuana remains federally prohibited. Although State measures yield in instances of conflict,

In addition to measures removing State law barriers to medically-recommended marijuana, States have enacted measures reforming mandatory minimum sentencing laws, making drug treatment more widely available, removing barriers to effective pain medications for those suffering from intractable pain, see, *e.g.* Cal. Health & Safety Code § 124960(d),[5] and modifying laws relating to sterile syringes, *e.g.*, Rev. Code Wash. § 69.50.412(5); see "Lawmakers OK Clean-Needle Bill," *Newark Star-Ledger* (Dec. 12, 2006) (describing New Jersey legislation culminating "more than a dozen years and countless hours of impassioned debate," explaining that "[f]or 13 years, lawmakers have wrestled with the legal and moral paradox of giving addicts syringes to use illicit drugs," but that "scores of scientific studies," cited by proponents had eventually carried the day).

Many of these measures have been enacted by popular initiative, with millions of Americans casting ballots on the reform side – with many prominent elected officials and medical and public health organizations spearheading support for reforms. Millions of citizens have also voted or spoken

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U.S. Const art. VI, States are sovereigns, and whether their non-preempted laws proscribe or permit conduct is of vast legal and practical significance. In addition, the censorship here was imposed by those acting under color of Alaska, not federal, law, and that State has recognized a fundamental right to marijuana use by adults (including 18 year-old high school students like Frederick) in the privacy of the home. Cf. *Lorillard*, 533 U.S. at 564 (First Amendment analysis must take account that products advertised were legal for adult use)

Through a broader lens, discussion and experience at the State level can profoundly affect changes in federal law. See, *e.g.* KYVIG, REPEALING NATIONAL PROHIBITION at 68-69 (describing importance of State-level referenda condemning Prohibition as precursors to 21st Amendment).

[5]Indeed, these particular reforms – result of efforts by maverick health professionals who endured insults that they were no better then "drug pushers" – have come to play a central role in the debate over physician-assisted suicide. See, *e.g.*, 521 U.S. at 747 (Stevens, J., concurring in judgment) ("Encouraging the development and ensuring the availability of adequate pain treatment is of utmost importance").

against these reforms, cf. *Raich*, 545 U.S. at 57 (O'Connor, J., dissenting) (observing that "If I were a California citizen, I would not have voted for the medical marijuana ballot initiative") – and in many places, they have encountered outspoken opposition from government officials (and federal law enforcement authorities, especially), who frequently claim that any step away from prevailing approach undermines the law's anti-drug "message."[6]

Alaska, as Judge Kleinfeld's opinion noted, has been the locus of one the most intense and long-running of these citizen debates. See Pet.App.6a n.4 (explaining that "[m]essages about marijuana have a degree of political salience" there). By the time Frederick unfurled his banner, Alaskans had been arguing with one another about the legal status of marijuana for more than a quarter century. The State Supreme Court's decision in *Ravin v. State*, 537 P.2d 494 (1975), holding that criminal punishment for possession of a small amount of marijuana in one's home violated the State Constitution's right to privacy prompted a repeal effort that included failed constitutional amendments and a successful – but ultimately ineffectual – ballot initiative, see *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003). In 1998, the year Frederick entered high school, Alaskans debated and approved a medical marijuana ballot measure, and two years after that, the State's voters were presented – and rejected – a sweeping decriminalization ballot measure. See Verhovek, "Alaska's Voters to Decide On

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[6]Thus, last Term, in *Gonzales v. O Centro Espirita Beneficente U.D.V.*, the United States argued that a RFRA exemption would "increase] public familiarity with hoasca, * * * generat[e] public misperceptions about the safety of DMT tea, and fuel[] the development of a market for hoasca," Pet. Br. No. 04-1084 at 40 n.30. And the official ballot pamphlet, "Argument Against [California] Proposition 215" asserted that it would "damage * * * efforts to convince young people to remain drug free. It sends our children the false message that marijuana is safe and healthy." See also Partnership for A Drug-Free America, *The Wrong Message of Legalizing Illicit Drugs* (Aug. 18, 1994) ("Legalization sends [a] message * * * erodes the anti-drug attitudes of our youth and [encourages] them to try and use illegal drugs").

Legalizing Marijuana," *N.Y. Times* (Oct. 10, 2000).

It would be mistaken to observe that the enigmatic message on the banner was not a closely reasoned argument for law reform and that its suppression poses no threat to more earnest appeals. The First Amendment's limitations are not limited to speech by "philosophers," *Texas v. Johnson*, 491 U.S. at 421 (Kennedy, J., concurring); see also *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), and Petitioners' own characterization confirms that *they* discerned a political aspect to the message. See Ct.App.Br.21 (calling banner "at best, a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs" and describing Frederick as deserving of punishment for "belittl[ing]" administrators' pursuit of their "critical [anti-drug] mission"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (restraints on "criticism of government and public officials are [inconsistent] with the First Amendment"); see also Pet.App.6a n.4 (noting that statements about marijuana "might be understood as political advocacy").

Even more important, the logic of Petitioners' position does not suggest a distinction between "whimsical" banners and those which lay out a reasoned case for drug reform. On the contrary, if potential to "undermine" the government's anti-drug message is the source of the power to censor, it is unimaginable that a banner urging that voters "legalize marijuana" in the next election would be protected – or a pamphlet that summarized the Institute of Medicine's findings that "marijuana users appear to be less likely to [become dependent] than users * * * of alcohol and nicotine[], and marijuana dependence appears to be less severe than dependence on other drugs"; that "marijuana use * * * does not appear to be a gateway drug to the extent that it is the cause or even * * * the most significant predictor of serious drug abuse," or that report's rejection of the view that "because [marijuana] is an illegal substance, * * * any use of marijuana [is] substance abuse." See MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (1999) ("IOM

REPORT") 86, 98, 101. A speech referencing this Court's recent observation that allowing peyote use by Native American Church members belied the government's assertion that "any Schedule I substance is in fact always highly dangerous in any amount no matter how used," *O Centro*, 126 S. Ct. 1211, 122 (2006), would be suspect – as would one referencing the U.S. Sentencing Commission's observation that "the negative effects from prenatal exposure to cocaine are very similar to those associated with prenatal tobacco exposure and less severe than the negative effects of prenatal exposure to alcohol," *Report to the Congress: Cocaine and Federal Sentencing Policy* 100 (2002) –or one reading from a recent *Juneau Empire* editorial entitled, "Think Outside The Box, Decriminalize Marijuana" declaring that "the reality is that Prohibition did not work and the effort to stamp out marijuana is not working either." Despite all the government's efforts, it is available to just about anyone, in any part of the nation." (Jan. 1, 2007).

These are not "slippery slope" concerns: "[t]his wolf comes as a wolf," *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Rather than suggest that expression more explicitly addressing a political matter, such as a drug legalization ballot initiative, would somehow be exempted, despite its "drug promoting" tendencies, the United States asserts (Br. 27) "'legalize' is not a magic word that clothes speech advocating drug use from school discipline. And students do not have a First Amendment right to display 'legalize marijuana' *banners* * * * at events like the one at issue here") (emphasis in original); compare *ACLU v. Mineta*, 319 F. Supp. 2d 69, 78 (D. D.C. 2004) ("a government regulation that directly placed prohibitions on speech advocating the legalization of marijuana, but allowed the opposite point of view * * * unquestionably would be unconstitutional").[7]

[7]Although emphasizing "banners" seems to imply that there was something objectionable about the *form* of Frederick's expression, punishment was not imposed pursuant to a "no banners" policy, but rather an anti-drug policy.

There is no reason to expect that government officials would be reluctant to wield the "bad tendencies" theory against reform arguments. As noted above, law enforcement authorities opposing drug law reforms in the political arena almost always do so on the ground that efforts to discourage improper use will be undermined, see n.6, *supra* (collecting examples), or by casting aspersions on the "agenda" of those who criticize the status quo.

But such claims, when made in public debate, may be met with reasoned, evidence-based counterargument. See, *e.g.*, IOM REPORT at 104 (finding "no convincing data to support [the] concern" that permitting medical use of marijuana would lead to an increase of marijuana use in the general population, noting and "no evidence that the medical marijuana debate has altered adolescents' perceptions of the risks associated with marijuana use"); Satcher, *Evidence-Based Findings on the Efficacy of Syringe Exchange Programs* (2000) (Surgeon's General's finding of "conclusive scientific evidence that syringe exchange programs * * * do[] not encourage the use of illegal drugs"); IOM REPORT at 102 (observing that "widespread concern among physicians and medical licensing boards that liberal use of opiates would result in many addicts * * * * [has] proven unfounded; it is now recognized that fear of producing addicts through medical treatment resulted in needless suffering among patients with pain as physicians needlessly limited appropriate doses of medications"). Cf. Zernike, "Anti-Drug Program Says it Will Adopt a New Strategy," *N.Y. Times* (Feb. 15, 2001) ("DARE has long dismissed criticism of its approach as flawed or the work of groups that favor decriminalization of drug use. But the body of research had grown to the point that the organization could no longer ignore it. In the past two months alone, both the surgeon general and the National Academy of Sciences have issued reports saying that DARE's approach is ineffective").

II. High School Students Are And Should Be Full Participants In the Policy Discussion

Petitioners' offhand suggestion (Br.19 n.4) that the "marketplace of ideas" protected by the First Amendment is open only to those who have attained the age of majority (a notion that would not augment their power over the 18-year old respondent here), is refuted not only by *Tinker* (which referred to the "First Amendment rights" of the 13, 15, and 16-year olds plaintiffs), but also by *R.A.V.* and *Barnette*.

Whatever may have been the case in England in 1859, constitutional protection – and participation in public affairs – by students of high school age is and long has been the norm on these shores. See *Tinker*; LEVINE, FREEDOM'S CHILDREN 77-92 (1993) (describing 1963 "Children's Crusade" in Birmingham, Alabama). Students have been full and active participants in many recent drug policy debates, – on both sides of the reform position see Stockton, "Marijuana Vote Sparks Passion on Both Sides," *Juneau Empire* (Oct. 25, 1998) (noting that students at Juneau-Douglas High School students had formed "Juneau's Teens Against Ballot Measure 8 [permitting medical use]"); Br. *Amicus Curiae*, Students for Sensible Drug Policy.

Students are distinctly affected by – and distinctly qualified to speak about – a number of drug policies that are the subject of intense debate, see *Earls* (linking high school activities to drug tests); 20 U.S.C. § 1091(r)(1) (denying education aid based on previous drug conviction), and younger people bear especially severe collateral effects of lengthy sentencing laws. BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2006); Simmons, *Children of Incarcerated Parents* 3 (Cal. Research Bureau (2000) (nearly 300,000 California children have a parent incarcerated). There is a strong First Amendment interest in assuring that views are heard by those who decide such policies. See *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (linking freedom of discussion to "information "appropriate to enable the members

of society to cope with the exigencies of their period"); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 699 (1990) (Scalia, J., dissenting) (noting nonprofit corporations with "unique views of vital importance to the electorate"); cf. *San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam) (on some issues, "public employees are uniquely qualified to comment").

Indeed, the Briefs of Petitioners and their *Amici* go far in making this case. Accepting the paramount importance of preventing youth drug substance abuse – and the government-documented difficulty of crafting messages that actually advance that interest, see G.A.O., *Rep. No. GAO-03-172R, Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs* 2 (Jan 16, 2003) (finding "no significant differences in illicit drug use between students who received [widely-used drug education program] and students who did not"); G.A.O. Rep. No. 06-818, *Contractor's National Evaluation Did Not Find That the Youth Anti-Drug Media Campaign Was Effective in Reducing Youth Drug Use* (Aug. 25, 2006) (endorsing conclusion that "campaign was not effective in reducing youth drug use, either during the entire period of the campaign or during the period from 2002 to 2004 when the campaign was redirected and focused on marijuana use"), it is deeply irresponsible to ignore what high school students actually think, know, and believe, about the subject, see Brown, *Listen to the Kids: When It Comes to Drug Education, Students Confirm What Research Says*, AM. SCHOOL BOARD J., Dec. 1997, at 40 – or to punish them because officials do not like what they have to say. See Ct.App.Br.21 (asserting that Respondent's "belittl[ing]" administrators' pursuit of their "critical [anti-drug] mission" was punishable).

III. The "Special Characteristics" of The Public School Forum Do Not Supply Authority For Punishing Frederick's Expression of A Government-Disfavored View

Just as this Court's "student speech" cases do not recognize governmental power to punish high school students' free expression based on their age, they do not, as the Court of Appeals acknowledged, rest on their status as enrollees in public-run schools. See Pet.App.5a (unconstitutionality of punishing a "student [for] having an after-school job at a video store that rents out Cheech and Chong tapes [or] * * * driving a car on public streets with a 'Bong Hits 4 Jesus' bumper sticker" is "easy").

Rather, these cases recognize that the Constitution protects students' freedom of belief and expression inside and outside the "schoolhouse gate," *Tinker* 393 U.S. at 506; see also *Barnette*, but that general First Amendment principles must be applied in light of the "special characteristics" of the public school forum, *id.*; see also *id.* at 512 (delimiting permissible grounds for suppressing students' "expressi[ons of] their personal views *on the school premises*") (emphasis added). The Court of Appeals was unassailably correct to hold that these "student speech" cases supply no authority for the viewpoint-based punishment Petitioners imposed; its only error (albeit harmless, under these circumstances) was in understating the extent of First Amendment protection to which Frederick's expression was entitled.

A. Frederick Was Speaking Publicly, As A Citizen, In A Public Forum

Petitioners and *Amici* insist (and the decision below agreed) that, though Frederick was not "on the school premises" when he displayed his banner, it would be error to treat "which side of the street [he] chose to stand on" as "constitutionally dispositive," U.S. Br. 27 – given that the banner was visible to JDHS students across the street, who were present at the Torch Relay under school supervision. Accord Pet.App.6a ("Frederick was a student, and school was in session").

This is wrong. It is of course not uncommon in First Amendment jurisprudence for such variables to have large

weight. See, e.g., *Schenck v. Pro-Choice Network*, 519 U.S. 357, 378-82 (1997); cf. *Burson v. Freeman*, 504 U.S. 191 (1992). But Respondent's entitlement to undiluted First Amendment protection is not based on his expression's occurring far enough away from a public *school*, but rather because of where it did occur: in a public *forum* – indeed, the quintessential such forum, a public sidewalk along a parade route. As legions of this Court's cases instruct, that undisputed fact *is* "constitutionally dispositive": the first task in judging a governmental limitation on expression is to "identify the nature of the forum" in which expression occurs, see, *e.g.*, *Cornelius v. NAACP LDF, Inc.*, 473 U.S. 788, 800 (1985); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 671 (1998), and if it is held to be "public" in character,"the government's ability to restrict expressive activity is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1984). The Nation's

> tradition of free speech commands that a speaker who takes to the street corner to express his views * * * should be free from interference by the State based on the content of what he says.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579 (1995). Indeed, this point was highlighted in *Kuhlmeier*: "[t]he public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'" 484 U.S. 260, 267 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

Under settled law, the sidewalk's relative proximity to the public high school was immaterial: "public forum property * * * will not lose its historically recognized character for the reason that it abuts government property * * * dedicated to a use other than as a forum for public expression," *Grace*, 461 U.S. at 180; *Boos v. Berry*, 485 U.S. 312 (1988) (applying public forum standards to sidewalks outside foreign embassies).

Nor can the presence in the audience of public high school students, or the fact that they were present at the public event under the school's auspices, make "school speech" rules control. The assembled crowd included many non-students, – Petitioners found the message was intended "for the benefit of television cameras covering the Torch Relay," Pet.App.62a; see *Lorillard*, 533 U.S. at 564. Visits by school groups to this Court or to Boston's St. Patrick's Day parade would not authorize censorship under the standards of the public school setting.[8] Indeed, the "special * * * First Amendment protection," for speech in public fora, *Grace*, 461 U.S. at 180, has never been grounded on the assumption that students of high school (and younger) age do not frequent streets and parks.

These principles control Respondent's Free Speech claim.[9] Because *every other person* standing along side Frederick – including a private school student, a recent graduate, or a recent JDHS drop out – could lawfully have displayed precisely the same banner to the same audience, so too could he. "If the speaker[] here were not [a high school student], no one would

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[8]Under *Hurley*, the presence of students enrolled at a school committed to teaching tolerance and respect would not have supplied a reason for rehabilitating the inclusion mandate the Court struck down, nor could a principal prevent a Boy Scout troop from participating, see *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) – or punish a student for marching under the Boy Scout Flag. That, in relevant respects, is this case.

Similarly, that Petitioners' responsibility for educating students about nutrition would presumably allow them to exclude sugar-laden soft drinks from the cafeteria, see Center For Science In the Public Interest, *Liquid Candy, How Soft Drinks Are Harming Americans Health* (2005), it would not have allowed them to pull down a Coca Cola banner that sought to associate cola drinking with a healthy lifestyle, on the ground that it was visible to the student audience.

[9]There is a plain, unacknowledged tension between Petitioners' insistence that the Court of Appeals took an insufficiently categorical approach – by noting that the event was privately sponsored and that teacher supervision was, in fact, lax – and their central premise that the Court need not strictly follow its (very categorical) public forum case law in a case involving expression that occurred in a public forum.

suggest that the State could silence [his] proposed speech," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). See *Rosenberger v. University of Virginia*, 515 U.S. 819, 828 (1995) (principle that "government regulation may not favor one speaker over another" derives from the "axiom[] that the government may not regulate speech based on * * * the message it conveys"). Accord *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980); *Greater New Orleans Broadcasting Ass'n, Inc. United States*, 527 U.S. 173, 193 (1999) ("[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment"); *Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1993).[10]

Petitioners' attempts to analogize the circumstances here to those of a student on an off-campus class trip fail to reckon with

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[10] That the expression of a student peer is said to be more persuasive than another's (*i.e.*, through "peer pressure" U.S. Br. 17) would not, under usual First Amendment rules, be a permissible ground for a speaker-based restriction, see *Austin*, 494 U.S. at 695 (1990) (Scalia, J., dissenting) (First Amendment does not allow restrictions grounded on the notion that an individual's "speech may be 'unduly' persuasive * * * or 'unduly' respected (because they are clergymen)"), but the issue need not be squarely faced here, because it is simply impossible to describe a *banner*, let alone a delphic one directed at the television audience, as "pressuring" others. Cf. *Board of Educ. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J.) (noting that policy gave "adolescents a nonthreatening reason to decline his friend's drug-use invitations").

Nor is there anything "strange" about the "dichotomy" (Pet. Br. 30 n.9) between the decision below and the Fourth Circuit's (pre-*Lorillard*) decision upholding an ordinance limiting the location of alcohol advertising, see *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996). This Court's cases generally give noncommercial speech greater protection than advertising – and while advertising, by definition, "promotes" the product, what Frederick wanted viewers to do is far from clear. Most important, a geographic ban like the one upheld in *Schmoke* applies even-handedly to the same speech – advertising. Here, a hypothetical non-student "Frederick Joseph,"could have taken up the same banner with impunity.

the *reason* why broader First Amendment protection is afforded in the public forum: because citizens are free to speak their minds "'in a place where [they] ha[ve] every right to be,'" *Grace*, 461 U.S. at 184 (Marshall, J., concurring and dissenting in part) (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)) (Opinion of Fortas, J). Frederick was not trying to speak in a school-created forum, see *Fraser*, 478 U.S. at 677; his presence on the public sidewalk, was, as a matter of fact and law, independent of school authorities. Compare Pet.App.58a (Policy No. 5850) ("Participation in * * * class trips is not a right"). He was present and expressing himself, not as a student – but as a citizen.[11]

B. The Court's "Student Speech" Decisions Do Not Confer Sweeping Powers Of Viewpoint-Based Suppression

Although Respondent's public forum speech is entitled to full protection, the viewpoint-based censorship at issue here fares no better under the First Amendment standards applicable to student speech in the public schools. At the center of

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[11]The Government's suggestion (U.S. Br. 24) that public school students' Free Speech rights be determined under rules applicable to government *employees* likewise ignores critical dissimilarities between the respective legal relationships. First, many public employees' duties include delivering government's *message*, and their effectiveness in doing so can be impaired by what they say elsewhere, see *Davis v. Monroe Bd. of Educ.* (Kennedy, J., dissenting) (noting Court's unanimity "that the school [does not] act[] through its students"); *LSC v. Velazquez*, 531 U.S. 533, 542 (2001) (when government "funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee") (quoting *Rosenberger*, 515 U.S. at 833). That authorities may exclude a person from teaching in the public schools based on citizenship, *Ambach v. Norwick*, 441 U.S. 68, 76 (1979), obviously does not define power to exclude a student on that ground. See *Plyler v. Doe*, 457 U.S. 202 (1982). Moreover, because school attendance (up to a certain age) is compulsory, a restriction is the equivalent of a mandate, rather than a condition on a benefit. See *Barnette*, 319 U.S. at 629 (noting interplay of flag salute requirement and attendance laws); *Earls*, 533 U.S. at 841 (Breyer, J., concurring) (noting that drug testing policy "preserve[d an] option for a conscientious objector").

Petitioners' contrary argument is a breathtaking reinterpretation of *Tinker* and *Fraser* – which are claimed to have together established that student speech may not be suppressed to quell controversy, but that the student may be punished for "undermining" the school's communication of a message important to its educational mission.[12] As the court below was quick to perceive, Petitioners' "undermining"/"mission" construct is a roundabout way of describing power to punish speech based on governmental disapproval or disagreement with the idea expressed, *i.e.*, "viewpoint discrimination."

So disambiguated, the claim that *Tinker* prohibited school authorities from suppressing discussion of controversial *topics* – but left the door open for suppressing speech expressing government-disfavored *viewpoints* (on matters "central" to the school) is simply untenable. It is a cardinal First Amendment principle that viewpoint-based restrictions are *more* suspect than those which apply even-handedly to all sides of an issue, *ACLU v. Mineta*, 319 F. Supp. 2d at 86 (a law aimed at "shield[ing] the nation's youth from *all* conversation regarding controlled substances" might have been permissible; one targeting only one side of the "dialogue regarding legislative reform of the narcotics laws"); see also *Velazquez*, 531 U.S. at 548-49 (otherwise discretionary "funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest"), and nothing in *Tinker* hints that things should be inverted inside the school gate. To be sure, *Tinker* held that public schools are not the kind of forum from which controversial speech may be excluded (absent "material[] and substantial disruption," 393 U.S. at 513), but it also squarely rejected that official disapproval could justify punishing a student speaker. *Id.* (A rule "forbidding * * *

[12]Petitioners and *Amici* include references to *Kuhlmeier* – and half-hearted suggestions that they punished Frederick to "disassociate" – the school from his banner, U.S. Br.17. But Frederick obviously did not claim that the "First Amendment require[d Petitioners] affirmatively to promote" his expression, 484 U.S. at 271, just to leave it alone.

expression by any student of opposition to [Vietnam War] would be an "obvious" constitutional violation).

Fraser picked up this central point, emphasizing that "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint." 478 U.S. at 685; see also *id.* at 689 (Blackmun, J., concurring) ("There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express"). Indeed, almost every page of *Fraser* resonates with the general First Amendment rule that government may more freely regulate the time, place, and manner of protected speech, but not the idea expressed. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). See 478 U.S. at 683, 684 (school may limit the "terms" and "manner" of student speech in an assembly). But the Court approved the civility-promoting rules Thomas Jefferson drafted for congressional debate, see 478 U.S. at 681-82 (prohibiting "indecent" speech) – not the "gag rules" Congress imposed to assure that Nineteenth century critics of slavery could not be heard. See *supra*.[13]

The First Amendment problem with Petitioners' argument is not, as the decision below may have implied, that a school might define its "mission" too elastically, see U.S.Br.11 (arguing that "a school can conceive of its mission as involving not only the graduation of well-educated students, but students who have emerged from their K-12 years free from the scourge of illegal drugs"); or that prevention is not an "important" part of the high school curriculum," Pet.Br.9, but rather with its premise – that suppressing heterodox speech is a constitutionally permissible means for schools to get across even their most important messages. The viewpoint

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[13]It is likewise implausible to interpret *Fraser*'s reference to "offensive terms," 478 U.S. at 683, as repudiating the "bedrock" First Amendment bar to censoring "expression * * * because society finds the idea itself offensive," *Johnson*, 491 U.S. at 414.

discrimination discussed in *Tinker* was not condemned because it concerned a federal, rather than a Des Moines, matter (*i.e.*, the Vietnam War); it was condemned because it was viewpoint discrimination.

There are no shortage of cases explaining why government may not "interfere with speech for no better reason than promoting [its own] approved message," *Hurley*, 515 U.S. at 579; *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *R.A.V.*, 505 U.S. at 396, and that principle's application to the public school environment was settled long before *Tinker* – in *Barnette*, a landmark decision Petitioners do not cite even once. The Court did not strike down the mandatory pledge law because it doubted the importance of the objectives pursued – "'national security'" and "'national unity,'"– 319 U.S. at 626, or that the Board of Education's decision to make recitation part of the school day was the kind of legitimate judgment it was authorized to make. Rather, the Court held that compulsory speech "was not a permissible means" of advancing that end, *id.* at 640.[14]

Though decided on general Due Process grounds, *Meyer v. Nebraska*, 262 U.S. 390 (1923), is to the same effect. It struck down a law prohibiting foreign language instruction not on account of doubts as to the legitimacy or educational importance of the measure's objective – graduating students fluent in English and thereby "prepared * * * to understand current discussions of civic matters" – but rather because that "desirable end cannot be promoted by [the] prohibited means" of limiting what else students could learn. *Id* at 403. See *Tinker*, 393 U.S. at 511 ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of

[14]In doing so, the Court explicitly acknowledged the "legislative judgment" recognized in *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599 (1940), that failure to punish the Witnesses "'might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.'" 319 U.S. at 635 n.16 (quoting 310 U.S. at 599).

those sentiments that are officially approved").

These decisions give no indication that a different rule holds as the curricular hard core of the "work of the schools," 393 U.S. 508, is approached. That school authorities have almost plenary power to make educational judgments as to what scientific principles are important for students to learn, cf. *Edwards v. Aguillard*, 482 U.S. 578 (1987), or whether and which foreign languages will be taught, *Meyer*, *Island Trees School Dist. v. Pico*, 457 U.S. 853 (1982), does not imply the power to prevent "undermining" such decisions by suppressing disagreement.

Nor do *Amici*'s efforts to conjure a mission beyond drug abuse prevention – to present censorship as inculcating "fundamental democratic values" – make for easy reading. The claim that "advocacy of unlawful conduct * * * strikes at the heart of a school's basic educational mission to teach 'fundamental democratic values'" because "our society depends on the willingness of its members to work to change objectionable laws, rather than simply violating them," U.S. Br.12, sits uncomfortably in a brief that elsewhere maintains that Frederick could have been punished for expressly advocating a legalization measure, *id.* 27. The notion that "respect for law" is advanced by punishing those who disagree with them is hardly a "democratic value," see *Whitney*, 274 U.S. at 377 (Brandeis, J.); and whether obedience to law is an unqualified duty is no easy question. See *Barnette*, 319 U.S. at 629 (vindicating claim grounded in belief "that the obligation imposed by law of God is superior to that of laws enacted by temporal government").

Presumably *Amicus* would not say that President Bush undermined the school district's message by lauding Rosa Parks's "defiance" of Montgomery's segregation laws, "as an act of personal courage [that] transformed America for the better," Address to Armed Forces Wives' Luncheon (Oct. 29, 2005); see *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288,

302 (1964) (rejecting effort to oust NAACP based partly on its "organizing, supporting and financing an illegal boycott'") – or that speaker at Fairbanks' recent Martin Luther King Jr. Holiday Youth Breakfast was interfering with public educators' mission when he told the students assembled about 15-year-old Claudette Clovin, whose earlier arrest for violating the same segregation law had inspired Rosa Parks's stand. See Friedenauer, "Inspired by an Unsung Hero," *Fairbanks News-Miner* (Jan. 21, 2007).

In fact, Alaska's State-adopted *Content and Performance Standards for Alaska Students* (2006), which "represent what Alaskans want students to know and be able to do as a result of their public schooling," *id.* at 2, suggest that public education does not have the mission imputed to it. Rather than exalt law obedience as a central value, the "government and citizenship" component suggests a vision more in line with *Barnette* than *Gobitis*, describing a well-educated young person as one who "recognize[s] the role of dissent in the American political system" and can "establish, explain, and apply criteria useful in evaluating rules and laws," *Id.* at 19-20.[15]

IV. Society's Unquestioned Interest in Curtailing Youth Drug Abuse Does Not Support The Punishment Imposed Here

A. The Suppression Here Bears No Real Relationship To Preventing Drug Abuse

In places, the submissions of Petitioners and *Amici* read like a plea for at least a de facto "special needs" exception to the First Amendment along the lines of the Fourth Amendment one recognized in *Earls*. In the context of the serious, intractable,

[15]The standards that relate most closely to drug abuse are phrased in less than dogmatic terms: Alaska expects high school graduates to "understand how the human body is affected by behaviors related to eating habits, physical fitness, personal hygiene, harmful substances, safety, and environmental conditions; and * * * * demonstrate an ability to make responsible decisions by discriminating among risks and by identifying consequences," *Id.* at 25.

and complex problem of youth drug abuse, this suggests, settled First Amendment rules – that "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996); that "the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it," *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001); and that "more speech, not enforced silence," is society's remedy, *Whitney*, 274 U.S. at 377 (Brandeis, J.) – fail to persuade, and *Barnette*'s concerns about the long-term effects of censorship are abstract.

While the force of such an appeal is understandable, the circumstances of this case only highlight why it must be rejected. First Amendment doctrine already recognizes that some government interests are compelling enough to suppress speech; but, recognizing claims of necessity will frequently (and sincerely) advanced and that the less tangible, but compelling benefits of free expression must be protected, it requires that those claiming compelling interests show that the repressive means will make a substantial difference. See *Barnette*, 319 U.S. at 636-37.[16]

What Petitioners defend here cannot possibly pass that test. Even accepting that a "Bong Hits 4 Jesus" banner on a public sidewalk can "lead to" youth drug abuse – premise that is both fanciful and fraught with First Amendment danger, the regime the Court is asked to uphold – one, as explained above, in which every other person present in the same public place could display a banner bearing a message identical to Frederick's, cannot stand. Comparable rules have been invalidated under First Amendment standards more deferential than those which govern here. See *Greater New Orleans*, 527 U.S. at 193.

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[16]The Court in that case rejected a claim of "national security" at a time of war, and the government purposes supporting measures struck down in *Lorillard*, *44 Liquormart*, and *R.A.V.* were extremely serious and compelling.

But saying only this much significantly *overstates* the efficacy of what Petitioners are defending. As they emphasize, banners are not the whole story: students are "bombarded with pro-drug messages from classmates, adults, and the media," Pet. Br. 27, and they get information from literature, political debate, parents and siblings; from their own experiences and observation of others. A student sitting at a personal computer can retrieve 22 million websites by typing in the word "marijuana" into a search engine – with those of the ONCDP and NORML among the first appearing. Whether government-maintained ignorance is an ideal, a policy that seeks to maintain a "closed circuit," is not an option. See *Bolger v. Youngs Drugs Prod. Corp.*, 463 U.S. 60, 73 & n. 26 (1983) (ban must be evaluated in light of likelihood that minors would have been exposed to similar "stimuli" from other sources).

Petitioners' exertions notwithstanding, the parallel here is not with *Earls*, but *Chandler v. Miller*, 520 U.S. 305, 322 (1997), which, after determining that the policy advanced no anti-drug purpose, apart from enhancing the State's "image [as] * * * committed to the struggle against drug abuse," held that Fourth Amendment privacy interests may not be "diminishe[d] for a symbol's sake," *id.*

B. Well-Intended Suppression of Students' Drug-Related Speech Is Inimical To The Asserted Prevention Interest

What has just been said is not an argument about the futility of prevention education, but rather about the futility of censorship. The relevance of the realities cited above realities is not limited to the legal question present here; they also critically affect how drug abuse prevention should be pursued. Given the inestimable seriousness of the problem of youth drug abuse, it must be common ground that what matters most is not the clarity of the message educators send youth, let alone the steadfastness conveyed to their parents or legislators, but rather the likelihood that the message will actually induce its audience to engage in less harmful behavior. As those who study

adolescent drug attitudes stress, strategies that deny the reality that students hear other messages, that they are intelligent and prone to cynicism, and that many have direct experience with drug use — and proceed from the assumption that teenagers will credit whatever they are told and therefore will be more deterred by an exaggerated harm message than an accurate one – cannot work. See Skager, *Beyond Zero Tolerance: A Reality-Based Approach to Drug Education and Student Assistance* 4-10 (2006). And, as noted above, reports of independent government evaluators confirm in depressing detail just how completely programs popular with parents and legislators have failed.

But this case is not about what educators should *say* – or what they may say – but rather what they can punish others for saying. And on this point, the case is even starker: those who craft and deliver the message *must know* what their intended audience actually thinks, knows, and believes about illegal drug use – whether these are grounded in fact or myth and even (especially) if attitudes are "pro-drug" or anti-authoritarian. There is no conceivable interest in having students tell school authorities what they want to hear, *i.e.*,"just *saying* no" – then doing otherwise.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 06-278

In the
Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
Petitioners,

v.

JOSEPH FREDERICK,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.[1] Lambda Legal has brought numerous cases to vindicate the free expression rights of lesbian, gay, bisexual and transgender ("LGBT") students, teachers and administrators, as well as their allies, under the First Amendment and the Equal Access Act, 20 U.S.C. § 4071 *et seq*. As part of this work, Lambda Legal has been at the forefront of advocating for the rights of students to form gay-straight alliances and to express LGBT perspectives on curricular subjects in the public schools. *See, e.g., Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *East High Sch. PRISM Club v. Seidel*, 95 F. Supp. 2d 1239 (D. Utah 2000); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1184 (D. Utah 1999). Lambda Legal is concerned that school officials may be given unfettered authority to silence student views that the school does not favor, when the expression of those views does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school or with the rights of other students.

At the same time, Lambda Legal also has represented numerous high school students who have

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for any party, and no one other than Lambda Legal has made any monetary contribution to its preparation.

been subjected to severe abuse and harassment at school based on their sexual orientation or sex. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001). Based on that work, Lambda Legal echoes the concern of the *amici* school administrators that school officials must be allowed to regulate student behavior that interferes with another student's right to receive an education or that seriously harms classmates in other ways. However, because neither this case, nor the questions on which *certiorari* were granted, involve such interference or harms, Lambda Legal submits this *amicus curiae* brief to assist the Court in properly applying the First Amendment to the speech involved in this case without unnecessarily reaching the issue, not presented here, of how school officials may regulate student conduct that adversely affects those students' peers.

SUMMARY OF ARGUMENT

This case concerns a school principal's suspension of a student, as well as the principal's seizure and destruction of a banner with the vague message, "Bong Hits 4 Jesus," held by the student along the route of a parade the student and his classmates had been permitted by the school to attend. The principal's sole justification for her action was that the message on the banner was inconsistent with the school's anti-drug advocacy.

Nearly forty years ago, this Court recognized that students have the right to engage in the expression of dissent in educational settings, as long as their speech does not disrupt the school's operation substantially or interfere with the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Whether a

school seeks to instill in youth a particular view regarding American foreign policy, illegal drug use or some other topic, the government's role as educator, *Tinker* explained, cannot transform students into "closed-circuit recipients of only that which the State chooses to communicate" nor justify confining student expression "to those sentiments that are officially approved." *Id.* at 511.

Tinker's teachings remain sound today, and the only two exceptions to *Tinker*'s general test – involving speech that is lewd or curriculum-based – are not presented by this case. As a result, this Court should reaffirm the rule that has governed schools for decades: a student's dissent in non-curriculum settings from a school's orthodoxy is constitutionally protected, so long as it is not lewd, likely to disrupt school operations substantially or likely to interfere with the rights of others.

Petitioners advance the dangerous argument that the viewpoints expressed by students during noncurricular activities are a form of school speech that school administrators should be able to control. This Court and others have recognized the difference between a school's own speech and speech it simply tolerates. Moreover, this and lower courts have rejected the argument that a school may censor student speech out of a fear that onlookers will misunderstand the source of the viewpoint.

Petitioners also vastly would extend a school's control over speech that offends because of the vulgar manner in which it is expressed to any speech that is "offensive" in the sense that it can be argued to depart from majoritarian sentiment. Petitioners candidly admit the fact that suppression of the banner in question was based solely upon the viewpoint of its message. Their approach would untether secondary schools from the First Amendment's anchor that government may not squelch a

message merely because it is at odds with government's preferred views. By exempting secondary schools from the established doctrine applicable to viewpoint-based restrictions, the Court would license schools to prohibit student expression of innumerable particular views – even in the extracurricular context – whenever those views are at odds with school policy. The wide range of social, political, religious, and personal matters on which local school boards often see fit to pronounce policy – a sample of which are discussed in Section I(C)(3) of this brief – demonstrates the danger of Petitioners' argument to the cherished principles of free speech and robust debate on which both American liberty and real education depend.

While school administrators do *not* have justification to censor speech that advances a viewpoint different from the school district, they do have a compelling interest in preventing interference with the rights of students to an education and to personal safety. However, the speech in this case does not present those concerns. Thus, this Court should reject the argument that a school's need to control such truly disruptive conduct justifies the censorship here. At the same time, the Court should not rule so broadly – and unnecessarily – regarding students' speech rights as to tie a school's hands to address conduct that causes other students serious harms.

ARGUMENT

I. *TINKER* PROTECTS THE SPEECH AT ISSUE.

This Court's landmark ruling in *Tinker* categorically rejected the notion that school officials are entitled to suppress "'expressions of feeling with which they do not wish to contend.'" 393 U.S. at 511 (quoting with approval *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). To

the contrary, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker*, 393 U.S. at 511.[2]

Petitioners seem to read *Tinker* as providing students with First Amendment rights only when they are engaged in "silent, passive political protest." (Brief of Petitioner [hereinafter "Pet. Br."] at 20, 25.) Relying on a distorted interpretation of *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988),[3] Petitioners essentially argue that any student expression in a school-related context is subject to the same level of control that schools have over their own speech and curriculum. (Pet. Br. at 24-25, 32-34.) And citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), Petitioners propose a doctrinal approach that would allow schools to censor any student whose viewpoint differs from messages administrators assert it is part of the school's mission to impart. (Pet. Br. at 21-24, 27-32.) Respectfully, Petitioners' interpretation of these decisions is

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[2] It does not matter that the message on the banner at issue in this case may have been vague or jocular. "[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Moreover, the prospect that a student could be disciplined for expressing a message as nebulous and farcical as "Bong Hits 4 Jesus" undoubtedly would lead to student self-censorship of far more serious and pointed expression, well beyond anything schools officials legitimately could interdict.

[3] Although Petitioners and the Ninth Circuit have referred to this case as *Kuhlmeier*, this brief will refer to it by the case's more commonly used short form name, *Hazelwood*.

inconsistent with the plain language of this Court's opinions and should be rejected.

A. The Court Should Reaffirm *Tinker*'s Application to Speech That Is Not Lewd Or Part Of A School's Curriculum.

In this Court's landmark ruling in *Tinker*, the Court began with what it called the "unmistakable holding" of numerous cases dating back to the 1920's that students do not "shed their constitutional rights to freedom of speech or expression" simply because they are attending school. 393 U.S. at 506. While Petitioners seek to distinguish the constitutionally protected wearing of wordless black armbands that was at issue in *Tinker* as involving silent, "passive" conduct that conveyed a political message (see Pet. Br. at 15, 20, 21, 25), this Court never suggested those attributes were necessary criteria for First Amendment protection to inhere.[4] Instead, quoting from *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), the Court in *Tinker* sweepingly reiterated that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Tinker*, 393 U.S. at 512. And, while the

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[4] Indeed, given the tenor of Petitioners' other arguments, it is unlikely that they truly accept this distinction. If Joseph Frederick had worn a green armband that was understood to extol political support for smoking of marijuana as an act of civil disobedience, the Juneau School Board's policy prohibiting "any public expression that ... advocates the use of substances that are illegal to minors" (see Juneau School Board Policy 5520, reprinted at Petition for Writ of Certiorari App. 53a-54a) would be equally violated.

special circumstances of the school environment at times require that students' expressive rights be constrained for the sake of maintaining order or protecting others' rights, this means only that schools may create rules of proper student *conduct*, *id.* at 507, not that they may impose hegemony over the ideas a student might express.

This Court said that a school's power has limits *within* the classroom, to say nothing of regulating student attendance at a parade on a public street, as here.[5] *See id.* at 508-09 ("Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk...."); at 512 ("A student's rights, therefore, do not embrace merely the classroom hours.").

The Court in *Tinker* poignantly defended the right of students to express views contrary to those of government and school officials, so long as the students do not disrupt the educational opportunities of others or otherwise violate their rights:

> *When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects* ..., if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. But *conduct* by the

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[5] This Court has acknowledged that spectators play a role in shaping the "public drama" that inheres in a parade, and that parades often attract banners with all sorts of messages, including those not part of the parade's theme. *See Hurley*, 515 U.S. at 568-70 (referring to "Say No to Drugs" banner at South Boston St. Patrick's Day Parade).

> student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 512-13 (emphasis added).

Three important lessons can be distilled from this portion of the Court's opinion. First, the mere fact that a student's speech occurs during a school-related activity is not reason to exempt it from First Amendment protection; the Court reached the very opposite conclusion. *Id.* at 512 ("The classroom is peculiarly the 'marketplace of ideas.'") (quoting *Keyishian,* 385 U.S. at 603). Second, certain restrictions on student speech may be justified as a means of regulating *conduct* that materially is disruptive of classwork, appropriate discipline, or other students' rights. Finally, the category of speech that may be curtailed is expressive conduct that collides with the rights of other students, not student expression that conflicts with school officials' preferred views.

Since *Tinker*, this Court has carved out two exceptions in which administrators may have the power to regulate student speech: (1) when such speech is vulgar, lewd, or indecent, *Fraser*, 478 U.S. at 683; or (2) when such speech (as opposed to simply the context in which it occurs) "may fairly be characterized as part of

the school curriculum," *Hazelwood*, 484 U.S. at 271.[6] As lower courts widely have recognized, *Tinker* states the general rule for student speech, while *Fraser* and *Hazelwood* are specific exceptions to *Tinker*'s application:

> To summarize: Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001); *accord Guiles v. Marineau*, 461 F.3d 320, 325-26 (2d Cir. 2006); *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 255-57 (4th Cir. 2003); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); *Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 739-40 (N.D. Ind. 2005) (noting that eight of the circuits agree that "*Tinker* provides the default rule for suppression of student speech, and *Fraser* and *Hazelwood* create narrow exceptions to the rule"); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1193-94 (rejecting the argument that

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[6] In both *Fraser* and *Hazelwood*, this Court was careful to reaffirm *Tinker*. *Fraser*, 478 U.S. at 681 (reaffirming "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms" so long as it is not done in a socially inappropriate manner); *Hazelwood*, 484 U.S. at 266 (students "cannot be punished merely for expressing their personal views on the school premises" outside the school's curriculum).

Fraser and *Hazelwood* "signal a retreat from *Tinker*'s powerful affirmation of students' rights to free expression of their views").

Yet the arguments of Petitioners and some of their supporting *amici* risk swallowing the *Tinker* rule by substantially expanding the narrow *Hazelwood* and *Fraser* exceptions. Under the doctrine they propose, a school could control not only the content of truly school-sponsored speech such as a newspaper for class credit, but also speech at any event open to the public that the school allowed students to attend. Additionally, administrators could censor not only lewd and vulgar speech but also any speech that contravened what the school termed its "basic mission." These arguments misread the Court's bedrock First Amendment cases and violate the principle of *Tinker* that students "may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511; *see also Colin*, 83 F. Supp. 2d at 1141 (schools' responsibility of inculcating values "does not permit educators to act as 'thought police' inhibiting all discussion that is not approved by, and in accord with the official position of, the state.").

B. *Hazelwood* Does Not Apply And Should Not Be Expanded To Cover All Student Speech Occurring In Any School-Related Context.

Petitioners advance the troubling argument that *Hazelwood* applies to this case merely because the school permitted students to attend the *corporate-sponsored* Olympic Torch rally. As the appellate court below explained, the student banner seized and destroyed in this case "was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as

part of an official school activity." *Frederick v. Morse*, 439 F.3d 1114, 1119 (9th Cir. 2006). In *Hazelwood*, by contrast, the school sponsored a student newspaper, and participating students received academic credit in "Journalism II." 484 U.S. at 268. While a school has the authority to control speech that "may fairly be characterized as part of the school curriculum," the strict *Tinker* holding still governs "educators' ability to silence a student's personal expression" in other circumstances. *Id.* at 271. Thus, it has been widely and correctly recognized that *Hazelwood* "governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself." *Saxe*, 240 F.3d at 213-14; *Guiles*, 461 F.3d at 327; *see also Hazelwood*, 484 U.S. at 270-71 (setting forth the difference between a school's general duty "to tolerate particular student speech – the question that we addressed in *Tinker*" and "whether the First Amendment requires a school affirmatively to promote particular student speech.").

Petitioners resurrect the argument, rejected by this Court, that a school can censor speech out of fear that onlookers incorrectly might associate the school with that speech. (*See* Pet. Br. at 33-34.) In upholding the rights of noncurricular religious clubs to meet on school property, this Court remarked: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990); *see also id.* at 260 (Kennedy, J., concurring). *Mergens* distinguished the newspaper in *Hazelwood* because the "high school newspaper produced as part of the school's journalism class was part of the curriculum." *Id.* at 237 (*citing Hazelwood*, 484 U.S. at 271). Courts have echoed Justice O'Connor's common-sense realization

that "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality opinion); *accord Saxe*, 240 F.3d at 214 (rejecting the notion that censorship is "justified under *Hazelwood* because observers might 'infer that the school endorses whatever it permits.'") (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993)). These courts recognize that students benefit both when a wide range of discussion is permitted and when the First Amendment's mandates are explained to them. *Id.* ("[The School District] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship.... The school's proper response is to educate the audience rather than squelch the speaker.").

Mergens reveals the danger of trying to expand *Hazelwood* to such an extent: if a school has the power to control noncurricular speech, then its failure to do so could be deemed an endorsement of such speech.[7]

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[7] Lower courts have had little trouble rejecting arguments to expand *Hazelwood*. "Any student group meeting on school premises may arguably be characterized as school-sponsored, but the Court must look beyond carelessly strewn labels and examine the substance of the relationship" between the school and the activity in question. *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 115 (D. Mass. 2003). The Third Circuit rejected as "very far from the mark" an argument that the *Hazelwood* standard applied to a school's distribution of literature from a variety of organizations. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004). "School- or government-sponsored speech occurs when a public school or other government entity aims 'to convey its own message'" and not when a school merely "facilitates the expression of 'a diversity

Expansion of the right to censor controversial ideas inevitably will lead to added community pressure for the school to do so. *See, e.g., Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 674-75 (E.D. Ky. 2003); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1191 n.39. The expansion of *Hazelwood* to cover speech in any activity that a school allows is an unwise affront to *Tinker*. As the Court recognized in *Mergens*, the fact that a school allows its students to express themselves in extracurricular activities and elsewhere does not transform the students' speech into the school's own. The Court should reaffirm the rule that student speech that is not a part of the school's own curriculum is governed by *Tinker*, not *Hazelwood*.

C. *Fraser* Also Does Not Apply And Should Not Be Extended To Cover The Expression Of An Unpopular Idea.

Petitioners additionally seek a dangerous expansion of the *Fraser* exception, which allows schools to censor

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of views from private speakers.'" *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 834 (1995)). Similarly, it generally has been recognized that "[a]llowing a student group to meet on school premises during non-instructional time ... does not affirmatively promote particular student speech" and is not likely to be seen as "'bearing the imprimatur of the school.'" *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1194-95; *see also L.W. v. Knox County Bd. of Educ.*, __ F. Supp. 2d ___, 2006 WL 2583151 (E.D. Tenn. Sept. 6, 2006) (students reading Bible to other students at recess not covered by *Hazelwood*); *O.T. ex rel. Turton v. Frenchtown Elem. Sch. Dist. Bd. of Educ.*, __ F. Supp. 2d __, 2006 WL 3579215, *5 (D.N.J. Dec. 11, 2006) (*Hazelwood* did not apply to school talent show because school "did not aim to convey its own message through the medium of the school talent show.").

speech that is lewd or vulgar.[8] Petitioners instead ask this Court to allow schools to define what constitutes their "basic educational mission" and censor any speech advancing a contrary position. (See Pet. Br. at 21-24.) Such a rule improperly would eviscerate *Tinker*.

1. *Fraser* Applies Only To The Manner, Not The Content Of Speech.

In *Fraser*, this Court held that a school may prohibit "lewd, indecent, or offensive speech and conduct." 478 U.S. at 683. The reason such speech could be prohibited was not simply because school officials disapproved of the speech or because the school board drafted a policy, as Petitioners suggest. Matthew Fraser was giving a nominating speech, and there was no suggestion that he was disciplined because the school preferred a particular outcome in the student election. It was the objectionable style of his speech, not its message or his viewpoint, which justified the school's prohibition. *Fraser*, 478 U.S. at 683. *Fraser* made clear that this Court was concerned with "certain modes of expression" that a student might use improperly and that what a school board had the power to regulate was the "manner of speech," not the views expressed. *Id.* Lower courts widely have understood *Fraser* to permit regulation of "the appropriateness of the manner in which the message is

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[8] *Fraser* also uses the term "offensive," which the Court limited to meaning insulting or sexual in content. *See* 478 U.S. at 683 ("The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students – indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students.").

conveyed, not of the message's content." *Saxe*, 240 F.3d at 213; *Guiles*, 461 F.3d at 328; *Newsom*, 354 F.3d at 256; *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536, 542 (6th Cir. 2001); *Nixon v. Northern Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1193; *Griggs*, 359 F. Supp. 2d at 739.

The sexualized way in which the speech in *Fraser* was delivered was understood to be acutely insulting to female students and potentially damaging to young people. This Court has since recognized that lewd, sexual speech by a student may interfere with the rights of other students or contribute to a hostile learning environment. *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646 (1999). Indeed, the Court viewed the lewd student expression at issue in *Davis* as a form of (mis)conduct that schools are expected to proscribe. *Id.*

By contrast, this case does not implicate *Fraser*'s concern that students express themselves in a manner that is not lewd.[9] Joseph Frederick might be able to be prohibited from wearing the infamous jacket of *Cohen v. California*, 403 U.S. 15 (1971), to school with "drug laws"

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[9] Courts generally have understood the limited nature of *Fraser*'s holding and applied it narrowly only to student speech fairly characterized as lewd. *Compare Posthumus v. Bd. of Educ. of Mona Shores Public Sch.*, 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005) (student could be disciplined for the "lewd and vulgar" reference to an assistant principal as a "dick"); *with Behymer-Smith v. Coral Acad. of Sci.*, 427 F. Supp. 2d 969, 972-73 (D. Nev. 2006) ("Plaintiff's recitation of Auden's poem, which includes the words 'damn' and 'hell,' does not constitute speech that can be considered vulgar, lewd, obscene, or offensive.").

substituted for "the draft." *See Fraser*, 468 U.S. at 682; *see also Broussard ex rel. Lord v. Sch. Bd. of City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992) (concluding that a school could prohibit a student from wearing a T-shirt that says "Drugs Suck!" because of the lewd and sexual nature of the reference). That question, however, is not posed by the present case.

Finally, Petitioners wrongly characterize Frederick's speech as "plainly offensive" under *Fraser*. (Pet. Br. at 28.) This Court should reject a definition of "plainly offensive" that would encompass speech that contravenes a school's policies. "[T]he phrase 'plainly offensive' as used in *Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission' or claims a legitimate pedagogical concern." *Guiles*, 461 F.3d at 330. "Nor was *Fraser* an invitation to censor and punish any speech that offends school authorities." *Frederick*, 439 F.3d at 1122 n.44. "Indeed, if schools were allowed to censor on such a wide-ranging basis, then *Tinker* would no longer have any effect." *Guiles*, 461 F.3d at 330; *see also Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 474 (6th Cir. 2000) (Gilman, J., dissenting) (it would be "essentially overruling *Tinker* [to] conclude[e] that after *Fraser* and *Kuhlmeier*, school officials can forbid whatever student speech they consider 'offensive' (in the sense of promoting 'disruptive and demoralizing values'), as long as their decision does not appear 'manifestly unreasonable.'").

Fraser gave administrators the authority to censor the "manner" of student speech where it is lewd or vulgar. But provocative speech that does not fall into that category is still protected under *Tinker*, and this Court should reaffirm that important principle.

2. Petitioners' View of *Fraser* Would Allow A School To Engage In Viewpoint Discrimination Simply By Labeling Its Public Policy Preferences As Part Of Its "Educational Mission."

Petitioners' reading of *Fraser* runs afoul of this Court's established suspicion of viewpoint-discriminatory government regulation. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.... The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 828-29 (citations omitted). The vice of such restrictions is that they are aimed at "suppressing particular ideas" and lend themselves to "invidious, thought-control purposes." *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 794 (1994) (Scalia, J., concurring and dissenting in part). The risk of indoctrination is no less serious in schools than other places; rather, in the compulsory educational context where inquiry and critical thinking should be encouraged, that risk is at its zenith.

When a speaker's viewpoint runs counter to the public policies established by government, that certainly is not a reason to afford the speaker *less* First Amendment protection. The First Amendment ordinarily denies a State the power to prohibit speech that "a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring). Indeed, the "enduring lesson" of this Court's First Amendment

jurisprudence is "that the government may not prohibit expression simply because it disagrees with its message." *Texas v. Johnson*, 491 U.S. 397, 416 (1989); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-86 (1992) (holding that government speech prohibition may not be based solely on state hostility towards a speaker's underlying message).

Despite Petitioners' complete avoidance of the doctrine, viewpoint neutrality certainly is not an alien concept for public schools. This Court repeatedly has struck down attempts by public schools to discriminate on the basis of a speaker's viewpoint. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) ("Because the restriction is viewpoint discriminatory, we need not decide whether it is reasonable in light of the purposes served by the forum."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975) ("In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."). The Nation's commitment to viewpoint neutrality for student speech likewise is embodied in the Equal Access Act, 20 U.S.C. § 4071 et seq., through which Congress extended the prohibition on viewpoint discrimination applicable to state universities, *see Widmar v. Vincent*, 454 U.S. 263 (1981), to all American secondary schools that receive federal funds.

Indeed, one of this Court's most poignant First Amendment decisions arose when students refused to conform their expression to the established policy preferences of school administrators. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), in upholding the First Amendment right of students to

decline to salute the American flag during the midst of World War II, this Court rejected the notion that the difficulty of educating good citizens justified enforced expression favored by local government officials who ran public schools: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

While Petitioners focus their argument on illegal drug use, (Pet. Br. at 26-30), their actions remain viewpoint discriminatory. The record strongly suggests that a banner with an anti-drug message would *not* have been censored. (See Joint Appendix at 25.) The Eleventh Circuit faced a similar argument a decade ago when the University of South Alabama denied funding to a gay student group on the ground that the group advocated violation of Alabama's sodomy and sexual misconduct laws. *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1546 (11th Cir. 1997). The court easily concluded that the school had engaged in viewpoint discrimination:

> [The University] prohibited funding to GLBA based on the Attorney General's unsupported assumption that GLBA fosters or promotes a *violation* of the sodomy or sexual misconduct laws. The statute discriminates against one particular viewpoint because state funding of groups which foster or promote *compliance* with the sodomy or sexual misconduct laws remains permissible. This is blatant viewpoint discrimination.

Id. at 1549.

Ironically, Petitioners justify their prohibition on the perceived message of Frederick's banner by reference to the very feature that most strongly cries out for First Amendment protection – that is, its perceived challenge to the orthodox viewpoint that drug use is an evil at all times to be curtailed. Even accepting that discouraging drug use by minors is a legitimate educational aim, and that educators have a sincere and empirical basis to oppose teenage drug use, the problem is that laudable ends do not justify unconstitutional means. *Johnson*, 491 U.S. at 418 ("It is not the State's ends, but its means, to which we object."). Surely the "war against drugs" (Pet. Br. at 26) is no greater justification for infringement of First Amendment liberties than World War II or the Vietnam War, waged when *Barnette* and *Tinker* were decided.[10]

As explained below, the breadth of topics included in state and local school board policies makes Petitioners' approach to the First Amendment all the more alarming.

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[10] There is a huge difference between preventing students from *using* drugs and preventing them from *talking* about them. Indeed, particularly because schools have been held in certain circumstances to have the power to conduct suspicionless drug testing of students, *see Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), students' expression of views on the subject of drug use may be one of the few ways they have of objecting to such measures.

3. Petitioners' Reading of *Fraser* Is Troubling Because School Policies Today Address A Broad Range of Civic, Political, Social, And Cultural Issues.

Petitioners' reading of *Fraser* to permit censorship of any speech that is contrary to the school's "mission" is a rigged game, because school authorities are the ones who typically define the "mission" of the educational system, which can touch on a wide range of politically charged topics. Allowing a school to censor any speech that contradicts even just the written statements of a school system's educational "mission" would eviscerate the First Amendment rights of students. A survey of school policies from around the country suffices to demonstrate the implications of Petitioners' argument.

The curricular guidelines for the State of Alaska expressly state that students must be taught to "develop an understanding of how science explains changes in life forms over time, including genetics, heredity, the process of natural selection, and biological evolution." Alaska Dept. of Educ., "Content and Performance Standards for Alaska Students" (4th ed. June 2005) at 15, *available at* http://www.eed.state.ak.us/standards/pdf/standards.pdf. The clearly stated educational "mission" of the Alaska schools is to teach the scientific theory of evolution and natural selection. Petitioners' argument thus logically could be applied to ban student speech questioning the theories of Charles Darwin.

California has enacted a comprehensive educational framework that is rife with instruction on issues that cause considerable controversy. California offers its own definition of "patriotism," stating that students should "[r]ealize that true patriotism celebrates the moral force

of the American idea as a nation that unites as one people the descendents of many cultures, races, religions or ethnic groups." California Dept. of Educ., "History-Social Science Framework for California Public Schools" (2005) at 21, *available at* http://www.cde.ca.gov/re/pn/fd/documents/hist-social-sci-frame.pdf. Whether one agrees or not with California's definition of "true patriotism," students should be free to offer up competing views of what patriotism means without fear that their speech could be censored for contradicting a scholastic "mission." California schools also are required to ensure that students "understand why a democracy needs citizens who value give-and-take on issues, who do not feel it necessary to go to war over every idea, and who seek middle ground on which consensus and cooperation can flourish." *Id.* at 23. Given this mission, would it be permissible to silence students who refuse to seek "middle ground" and hold their beliefs strongly and proudly? Can a school ban student speech simply because it suggests a degree of zeal that is out of step with the California Department of Education's mandate that schools teach students not to "go to war" over ideas? Additionally, could a California school discipline a student who spoke against the principle of showing "kindness toward domestic pets and the humane treatment of living creatures" that every teacher in the State is required to "endeavor to impress upon the minds" of pupils? *See* Cal. Educ. Code § 233.5(a).

A student praising the luncheon counter sit-ins of the Civil Rights movement, or advocating any civil disobedience, may run afoul of Florida's required instruction stressing "respect for authority." *See* Fla. Stat. §1003.42(s). While "respect for the environment" may be a fine ideal for Georgia to instill in its student body, *see* Ga. Code § 20-2-145, it ought not empower a

school to punish a student with a "Pave the Rainforest" bumper sticker on his backpack. *Id.* Were Petitioners' arguments to prevail, students rooting for the opposing team during Homecoming might be seen as violating the Georgia and Alabama school systems' missions of instilling "school pride." *See id.*; Ala. Code § 16-6B-2.

Virginia requires instruction in "economic self-reliance" and "the Golden Rule." Va. Code § 22.1-208.01. South Carolina requires students to be taught the importance of "sportsmanship." S.C. Stat. § 59-17-135. South Dakota mandates instruction to promote "regard for the elderly." S.D.C.L. § 13-33-6.1. Again, these goals of character education may be laudable, but students must be allowed to express opinions that run contrary to the stated curricular mission of their schools. The First Amendment tolerates no less. While it may be within the power of the Nebraska Legislature to require that students learn "the dangers and fallacies of ... Communism," Neb. Rev. Stat. § 79-724, it is not permissible for a school to censor students who see merit in the works of Karl Marx.

The San Francisco Board of Education has been extremely outspoken on matters of both national and international concern, even adopting a written policy opposing the war in Iraq. San Francisco Bd. of Educ., Res. No. 212-10A16A (January 14, 2003), *available at* http://portal.sfusd.edu/data/board/prf/memberreso/ACF50.pdf. The Board also has publicly opposed efforts to end affirmative action by state actors. San Francisco School Bd. of Educ., Res. No. 35-13A2 (March 2, 2004), *available at* http://portal.sfusd.edu/data/board/pdf/memberreso/oppose%20ward%20connerly%20final.pdf. Students in Juneau should no more be forbidden from dissenting publicly against their schools' view of drug use than

students in San Francisco's schools who disagree with their school systems' views about the Iraq war or affirmative action.

Amicus is particularly concerned about the impact Petitioners' desired rule might have on gay, lesbian, bisexual and transgender students and their allies. High school students have an established constitutional right to speak about their sexual orientation in school settings. *See Henkle*, 150 F. Supp. 2d at 1076; *Fricke v. Lynch*, 491 F. Supp. 381, 385, 387 (D.R.I. 1980). Where a school has created a public forum, students interested in exploring lesbian and gay perspectives on curricular subjects likewise have a First Amendment right to have the same access to the forum afforded other student groups. *See East High Sch. PRISM Club*, 95 F. Supp. 2d at 1251. But what if a school had a policy like that enacted (although later repealed) by the Merrimack, New Hampshire School Board, which stated: "The Merrimack School District shall neither implement nor carry out any program or activity that has either the purpose or effect of encouraging or supporting homosexuality as a positive lifestyle alternative"? Jill Smolowe, "The Unmarrying Kind," TIME, Apr. 29, 1996, *available at* http://www.time.com/time/magazine/article/0,9171,984469-1,00.html. Free speech rights should not depend on conformity with what school authorities consider orthodox, particularly in matters of students' sexual orientation.

While schools may have wide latitude to teach what they wish, they are not free to stamp out competing ideas. *Fraser* sought to ensure that students expressed their opinions in a manner that was not lewd or vulgar. It was not a license to censor viewpoints contrary to those held by the school administration. Given the vast array of

social and political issues on which school authorities opine, students cannot rightly be disciplined simply for voicing opinions at odds with school policies.

D. Frederick's Expression Is Protected Under *Tinker* Because It Neither Disrupted School Nor Interfered With The Rights Of Others.

Because *Tinker* governs this case, Frederick's expression is protected, as there was no demonstrated risk of material and substantial disruption of the school's operation and his speech did not interfere with the rights of other students. *See Tinker*, 393 U.S. at 513. Petitioners complain that Frederick's banner "interfered with decorum by radically changing the focus of a school activity." (Pet. Br. at 30.) Yet the black armbands involved in *Tinker* equally could have caused "discomfort and unpleasantness that always accompany an unpopular viewpoint," and obviously changed the focus of the school's teaching. *See Tinker*, 393 U.S. at 509. School officials are prohibited from censoring speech on the ground that it was "'meant to compete for students' attention.' The same can be said of any of the forms of student expression that have been found to be protected, including the wearing of armbands or buttons in class." *Holloman v. Harland*, 370 F.3d 1252, 1272 (11th Cir. 2004). If a school were allowed to censor any speech that might "distract" another student "from the planned curriculum, constitutional protection for student expression by definition would be eliminated." *Id.*

Even the "argument" or "disturbance" that *Tinker* says a school must tolerate did not occur here. *See Tinker*, 393 U.S. at 508. Courts have respected the *Tinker* command that an "undifferentiated fear or apprehension of disturbance" does not suffice. *Id.*

Instead, in order to justify limiting student's speech, a school must *demonstrate* a risk of substantial disruption. *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767 n.16 (9th Cir. 2006); *Guiles* 461 F.3d at 326; *Holloman*, 370 F.3d at 1276 (principal could not justify discipline out of a belief that "other students may react inappropriately or illegally[;] such reactions do not justify suppression of Holloman's expression."). Petitioners made no such showing. Frederick's expression aroused Principal Morse's ire, and apparently no one else's.

Unable to demonstrate a risk of substantial disruption, Petitioners resort to the claim here that Frederick's banner "was the wrong message, at the wrong time, and in the wrong place." (Pet. Br. at 32.) This argument is eerily similar to the claim rejected in *Tinker* "that 'the schools are no place for demonstrations.'" 393 U.S. at 509 n.3. Courts recognize that schoolyards and assemblies are legitimate venues for even unpopular student speech, so long as its expression does not interfere with the rights of other students. The courts have been vigilant in protecting such speech, particularly for those in the minority. *See, e.g., McLaughlin v. Bd. of Educ. of Pulaski County Special Sch. Dist.*, 296 F. Supp. 2d 960 (E.D. Ark. 2003) (school would have to justify under *Tinker* any limitation on a student's right to be openly gay); *Boyd County High Sch. Gay Straight Alliance*, 258 F. Supp. 2d. at 689 (under *Tinker*, the right of a gay-straight alliance to form could not be subject to a "heckler's veto" of other students); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1193 (gay-straight alliance could form in light of *Tinker*'s "protection of a student's right to express an unpopular view"); *Colin*, 83 F. Supp. 2d at 1141 ("The only way to maintain the 'independence and vigor of Americans' ... is through tolerating speech that school authorities may

vehemently disagree with.") (quoting *Tinker*, 393 U.S. at 509).

What made Frederick's expression wrong, in Petitioners' view, was not a resulting disruption but instead an opinion contrary to their own. That is not a reason that can pass muster under *Tinker* or any other of this Court's First Amendment decisions.

II. THIS CASE DOES NOT IMPLICATE A SCHOOL'S COMPELLING INTERESTS IN PROTECTING STUDENTS' RIGHTS TO AN EDUCATION AND TO PERSONAL SAFETY.

The brief of *amici* school administrators forcefully makes the point, not relevant to the questions presented by this appeal, that schools must be able to regulate student conduct that "interferes with maintaining a safe and effective learning environment." (Brief of *Amici Curiae* National School Boards Association *et al.* at 7, 15.) This echoes the proviso in *Tinker* that student speech may be limited when it produces a "collision with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508. While Petitioners argue vaguely that Frederick's banner interfered with "decorum," (Pet. Br. at 16, 30), there is no contention that Frederick interfered with the rights of others to receive an education.

This case does not present the problem of harassment of, epithets directed at, or violence against other students. Many courts have recognized that student speech that torments other students based on their personal characteristics implicates *Tinker*'s concern that student expression might in some circumstances collide with other students' rights. *See, e.g., Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 271 (3d

Cir. 2002) (considering code of conduct issued in the wake of "widespread racial harassment of students, disruption of school teaching, violence, interference with the rights of other students, and the subjection of male and female students to sexual and racial obscenities"); *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488 (D.S.C. 1997) (granting summary judgment against student who sought to wear jacket that looked like Confederate flag, when similar symbols in the past had sparked racial tension at the school). This case, however, in no way involves expressive attacks among students or other interference through student expression with other students' rights.

Thus, the serious concerns advanced by *amici* school administrators cannot justify the censorship under review. Because those concerns are important, however, this Court, in protecting the speech that is at issue in the instant appeal, should exercise care to distinguish explicitly the rule applied in this case from the rules governing conduct or expression that seriously interferes with the rights of others to an education and to personal safety.

CONCLUSION

For these reasons, *amicus* Lambda Legal Defense and Education Fund, Inc. respectfully requests that this Court affirm the judgment of the Ninth Circuit that the expression of Joseph Frederick was constitutionally protected and could not lawfully be censored nor punished by Petitioners.

Respectfully Submitted,

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No. 06-278

Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools, at school-sponsored, faculty-supervised events, to prohibit students from displaying messages promoting the use of illegal substances.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia and Washington, D.C., and has hundreds of affiliate attorneys in all fifty states. A significant part of Liberty Counsel's work involves representing students and organizations whose First Amendment rights have been violated by school districts and other governmental entities.

Subjective and overly broad regulation of speech, such as the suspension ordered by Petitioners, significantly undermines bedrock First Amendment freedoms. It is critically important that students' free speech rights not be sacrificed under the guise of avoiding governmental discomfort, but that this Court strike the proper balance between school discipline and free expression.

Liberty Counsel does not endorse the message contained in Mr. Frederick's banner. However, Liberty Counsel supports individuals' rights to make such statements without the risk of censure, suspension or expulsion. Liberty Counsel is extremely concerned about the effects this case could have

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[1] Liberty Counsel files this brief with the consent of all parties. Petitioners have a consent letter on file with this Court. The letter granting consent of Respondent is attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

on the free speech rights of individuals and organizations who interact with public school officials, and seeks to ensure that this Court has the information necessary to review this case in the broader context.

SUMMARY OF ARGUMENT

As this Court said forty years ago, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967)(citation omitted). The Ninth Circuit fully embraced this concept when it found that Petitioners had violated Joseph Frederick's First Amendment rights when they suspended him for ten days for standing on a public sidewalk at a community-wide event silently holding a banner that said "Bong Hits 4 Jesus."

The Ninth Circuit properly applied this Court's precedents, in particular *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and restored the proper balance between students' free speech rights and schools' pedagogical interests that was lost when Petitioners very publicly punished Mr. Frederick for the content of his speech. The Ninth Circuit's decision properly recognized that students like Mr. Frederick are "persons under our Constitution." *Id.* at 393 U.S. at 511. As this Court once said,

> [Students] are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit

> recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Id. Furthermore, the Ninth Circuit's characterization of Mr. Frederick's actions as "non-disruptive, off-campus speech," *Frederick v. Morse*, 439 F.3d 1114, 1118 (9th Cir. 2006), more accurately portrays the situation than does Petitioners' unsubstantiated proclamation that Mr. Frederick's actions along the Olympic torch route was "school-sponsored," "school-sanctioned" speech. The Ninth Circuit's portrayal also implicitly recognizes that Mr. Frederick was on a public sidewalk – a quintessential traditional public forum – and not within a school's designated public forum or nonpublic forum when he unfurled his banner. That detail is significant because it sets this case apart from this Court's other student speech cases and far outside the deferential review undertaken in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and sought by Petitioners. Examining Mr. Frederick's actions in the public forum context reveals how far Petitioners have strayed from this Court's student speech jurisprudence when they punished Mr. Frederick. This Court should decline Petitioners' invitation to validate their actions.

The case is about more than a high school student's publicity stunt. It is about how tomorrow's leaders will regard the First Amendment. Will they see it as Justice Brennan did, "The First Amendment ... gives us this society. The other provisions of the Constitution really only embellish it."?[2] Or

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[2] David L. Hudson, Jr., *Brennan's Struggle with the Detestable Was the Truest Mark of His First Amendment*

will they see it as a mere platitude, something that has no meaning if you are a public school student and say something that the administration does not like? If Petitioners have their way, the First Amendment will be little more than a hollow shell and schools will become the very "enclaves of totalitarianism" that this Court warned against. *See Tinker*, 393 U.S. at 511. Upholding the Ninth Circuit's ruling will prevent that devastating consequence and will preserve the balance between students' free speech rights and schools' legitimate concerns about preserving a safe educational environment.

ARGUMENT

I. THE NINTH CIRCUIT STRUCK THE PROPER BALANCE BETWEEN STUDENTS' FREE SPEECH RIGHTS AND SCHOOL DISTRICTS' INTEREST IN MAINTAINING A SAFE EDUCATIONAL ENVIRONMENT.

Professor Chemerinsky has provided a cogent answer for the question before this Court: "Schools cannot teach the importance of the First Amendment and simultaneously not follow it."[3] Professor Chemerinsky's statement illustrates the importance of balancing students' free speech rights and school districts' interests in maintaining a safe and effective

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Devotion, FIRST AMENDMENT NEWS, 8 (First Amendment Center August 1997).

[3] Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?* 48 DRAKE L.REV.527, 545 (2000).

learning environment.

> The simple fact is that there are two strongly competing interests at stake in student speech cases. On the one hand, free speech must be respected in schools because schools must teach students the values of democracy, and it would be hypocritical to conclude that the very institutions that teach the value of free speech would simultaneously prohibit its exercise. Conversely, no one could question that schools must be able to maintain a safe educational environment in order to facilitate learning.[4]

As First Amendment scholar David Hudson wrote:

> If students are to learn the lessons of democracy, such as the importance of exercising the right to freedom of speech, they must live in an environment that fosters the free exchange of ideas. Many free-speech experts believe that students will not learn the lessons of democracy if they cannot experience firsthand the freedom to make their own choices. Therefore, school officials, politicians, teachers and parents should balance legitimate safety concerns with the constitutional right of freedom of speech.[5]

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[4] Justin T. Peterson, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 3 MICH. ST. L. REV. 931, 940 (2005).

[5] David L. Hudson, Jr., THE SILENCING OF STUDENT VOICES: PRESERVING FREE SPEECH IN AMERICA'S SCHOOLS 6 (First Amendment Center 2003).

Professor Chemerinsky points out that the judiciary plays a significant part in maintaining the proper balance.

> School officials – like all government officials – often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech.[6]

The Ninth Circuit assumed that role and restored the balance that was lost when Petitioners punished Mr. Frederick for creating a banner with a message with which district officials were uncomfortable. Displeased with the balance struck by the Ninth Circuit, Petitioners are asking this Court to institute a double standard that would teach students like Mr. Frederick that the First Amendment does not apply to those Americans who happen to be public school students.

Petitioners and their Amici are asking this Court to give school officials carte blanche to regulate and restrict student speech anytime, anywhere based upon nothing more than a notion that the speech or conduct in question somehow conflicts with what the school defines as its "basic educational mission." Petitioners' proposal would not only slam the door on student expression, but also contradict this Court's longstanding admonition that governmental officials cannot be given unbridled discretion to regulate First Amendment activities.

The Ninth Circuit correctly concluded that "[t]here has to be some limit on the school's authority to define its mission" in order to honor "the bedrock principle of *Tinker* that

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[6] Chemerinsky at 545.

students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Morse v. Frederick*, 439 F.3d 1114, 1120 (9th Cir. 2006).

> All sorts of missions are undermined by legitimate and protected speech – a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, More Guns, Less Crime; a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers; and a school's traffic safety mission would be undermined by a student circulating copies of articles showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents. Public schools are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself."

Id. The Ninth Circuit observed that the standard sought by Petitioners would mean that "distributing photocopies of the Alaska Supreme Court decision in *Ravin v. State* [537 P.2d 494 (Alaska 1975)], in which it declared that there is 'no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana,' . . , would also undermine the school's anti-drug mission." *Id.* at 1122 n.44. Actually, under the regulatory scheme sought by Petitioners, handing out copies of *Ravin* on the sidewalk across the street from the school while students were released from classes could be punished.

Such an absurd result violates the "bedrock principle underlying the First Amendment" – "that the government may

not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This Court has consistently upheld that bedrock principle against precisely the type of unbridled discretion sought by Petitioners and has firmly established that the exercise of First Amendment rights cannot be contingent upon the uncontrolled will of a government official. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). Governmental authorities cannot dispense or withhold "permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community," *Id.* at 153, or in this case, on whatever the school district decides is part of its basic educational mission.

Earlier, in *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940), this Court noted that "[e]very expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." However, "the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Id.* at 104-105. "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." *Id.* As this Court established in *Tinker*, that is no less true in the school context, where students' First Amendment rights can be suppressed only if authorities "reasonably forecast substantial disruption of or material interference with school activities." *Tinker v. Des Moines*

Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

Petitioners are asking this Court to turn *Tinker* on its head and to sanction the very kind of standardless, subjective and unbridled discretion that this Court has repeatedly held is prohibited by the First Amendment. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133 (1992) (striking down county's assembly and parade ordinance)."Broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* "Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 (1975).

Petitioners' and Amici's proposal – that schools be permitted to prohibit speech that is "inconsistent" with their "core educational mission" – does not meet the constitutional touchstone. What is the district's "core educational mission?" Who decides what the mission is? What standards are applied to make the determination? Does the mission change over time? What aspects of the mission are sufficiently important so as to be deemed "core" under the Constitution? By what standard may courts review such determinations? Petitioners and their Amici do not answer those questions. In the words of William Shakespeare, "Ay, there's the rub."[7] Petitioners and their Amici imply that those questions need not be answered, because the Court should simply defer to the judgment of school administrators. "As a practical matter, whether such student speech is protected will depend on

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[7] William Shakespeare, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, Act 3, sc. 1.

context, and courts should defer to the reasonable judgment of school administrators on such contextual evaluations." (Brief of the United States as Amicus Curiae in Support of Petitioners, at 27). To do so would convert schools into "enclaves of totalitarianism, that strangle the free mind at its source." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 280 (1988)(Brennan, J., dissenting). Justice Brennan's conclusions in *Kuhlmeier* provide an apt response to Petitioners' request:

> The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Fraser, supra*, 478 U.S., at 682, 106 S.Ct., at 3164, students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker, supra,* 393 U.S., at 506, 89 S.Ct., at 736. Just as the public on the street corner must, in the interest of fostering "enlightened opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940), tolerate speech that "tempt[s] [the listener] to throw [the speaker] off the street," *id.*, at 309, 60 S.Ct., at 906, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

Kuhlmeier, 484 U.S. at 280. As Justice Brennan said, "in *Tinker*, this Court struck the balance." *Id.* The Ninth Circuit retained that balance and the critical role of public schools as "laboratories of democracy where students learn that they

have freedom of thought, belief, and speech,"[8] instead of "enclaves of totalitarianism."*See Tinker*, 393 U.S. at 511. This Court should reject Petitioners' request to upset the balance in favor of unbridled regulatory discretion.

II. STUDENT SPEECH IN GENERAL, AND MR. FREDERICK'S SPEECH IN PARTICULAR, MUST BE ANALYZED UNDER THE PUBLIC FORUM DOCTRINE BEFORE BEING SUBJECTED TO THE *TINKER-FRASER-KUHLMEIER* TESTS.

As is true in all First Amendment free speech cases, the critical initial consideration in this case must be the type of forum at which Mr. Frederick unfurled his banner. In this case, forum analysis is particularly important because it sets this case apart from the other student speech cases Petitioners rely upon. Petitioners evade the forum question by concluding, without substantiation, that Mr. Frederick participated in a "school-sponsored," or "school-sanctioned" event. (Brief of Petitioners at 32-33). Amici United States goes a step further and proclaims that the forum issue is "of no moment." (Brief of Amici United States at 22). To the contrary, the forum issue is of critical importance, both for illustrating the propriety of the Ninth Circuit's ruling and for demonstrating the dangers inherent in Petitioners' proposed regulatory scheme.

This Court has utilized the public forum doctrine as "a means of determining when the Government's interest in

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[8] Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums*, 39 WILLAMETTE L. REV. 93, 134-135 (2003).

limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."*Cornelius v. NAACP*, 473 U.S. 788, 800 (1985). "Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum."*Id.* Therefore, before determining whether a government official can exclude (or in this case punish) certain activities, the Court must first identify the relevant forum and then categorize the forum as public, nonpublic or designated. *Id.*

In this case, the forum is not a journalism class as in *Hazelwood School District. v. Kuhlmeier*, 484 U.S. 260 (1988), nor a mandatory school assembly as in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), nor even a high school campus as in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1960). Mr. Frederick unfurled his banner on a public sidewalk, which has "immemorially been held in trust for the use of the public, and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."*Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.* 460 U.S. 37, 45 (1983) (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)). When Mr. Frederick and his friends unrolled the "Bong Hits 4 Jesus" banner, they were standing on a public sidewalk among hundreds of people who had assembled along the Olympic torch route through Juneau. *See Frederick v. Morse*, 439 F.3d 1114, 1115-1116 (9th Cir. 2006). Despite Petitioners' claim this was a "school-sponsored" or "school sanctioned" event, in fact it was a community-wide "Winter Olympics Torch Relay" organized by Coca-Cola and other private sponsors. *Id.* The sidewalk upon which Mr. Frederick stood was not controlled by school district officials, limited to students or

school employees nor otherwise restricted from use by any member of the public attending the torch relay. Therefore, the sidewalk retained its character as a "quintessential public forum" *See Perry*, 460 U.S. at 45, and was not transformed into an extension of the high school regardless of its proximity to the campus.

Since Mr. Frederick unfurled his banner in a traditional public forum, the school district's rights to limit his expression or punish him for his expressive conduct were "sharply circumscribed."*See id.* Petitioners could only justify their actions if they could demonstrate that destroying Mr. Frederick's banner and suspending him from school were necessary to serve a compelling state interest and were narrowly tailored to achieve that goal. *See id.*

Clearly, that is not the case. Assuming that the "compelling state interest" at issue is discouraging the use of illegal drugs, destroying a poster that says "Bong Hits 4 Jesus" does nothing to further that cause. Even assuming, as Petitioners did, that the term "bong hits" in the poster referred to smoking marijuana, merely having those words on the poster, without more, did not contradict any anti-drug abuse message that Petitioners might be promoting. The poster did not say that marijuana should be legalized, that readers should smoke marijuana, nor otherwise send a message that could be construed as "promoting" the use of illegal drugs. Ripping the poster out of Mr. Frederick's hands did nothing to further any state interest in drug abuse prevention. Petitioners' actions in suspending Mr. Frederick are even more attenuated. Had Mr. Frederick been caught on campus using illegal drugs, then suspending him from school would further the school's interests. However, suspending him for holding up a banner while standing on a public street at a public event is neither necessary to Petitioners' anti-drug abuse message nor

narrowly tailored to address only that interest and not some other, such as avoiding controversy.

The fact that Mr. Frederick's activity occurred on a public sidewalk at a public event is significant to this Court's analysis of Petitioners' actions. This Court cannot accurately determine whether Petitioners violated Mr. Frederick's First Amendment rights unless it can determine whether Mr. Frederick's actions were compatible with the purpose of the property upon which he was conducting them. *See Cornelius*, 473 U.S. at 800. It is the nature of the forum, not Petitioners' categorization of the activity, that is determinative. Unlike the students in *Kuhlmeier, Fraser* and *Tinker*, Mr. Frederick was standing off campus, on a public sidewalk, at a public event, holding a sign that in no way identified him or the message as having any affiliation with Petitioners. Unlike the nonverbal expression engaged in by the students in *Tinker*, Mr. Frederick's message did not involve a contentious, on-going social and political event that had sparked protests and even violence throughout the country. If the *Tinker* students' anti-Vietnam War armbands worn on campus during the school day did not warrant school censure, then Mr. Frederick's nonverbal, admittedly nonsensical banner displayed off campus during a public event cannot warrant punishment. If Petitioners can punish Mr. Frederick for the content of his nondisruptive speech expressed off campus in a traditional public forum, then the power of the school district is plenary and the First Amendment is pointless. The implications of such a holding is breathtaking and poses a significant threat to free speech.

III. THE NINTH CIRCUIT CORRECTLY FOUND *TINKER* IS THE APPROPRIATE STANDARD TO APPLY TO MR. FREDERICK'S CONDUCT AND, UNDER *TINKER*, PETITIONERS COULD NOT CENSOR MR. FREDERICK'S CONDUCT.

Proper application of the public forum doctrine further illustrates the wisdom of the Ninth Circuit's approach to this case. Petitioners attempt to cast Mr. Frederick's conduct in the mold of the on-campus, school-sponsored student speech addressed in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) in order to rationalize their actions. However, the Ninth Circuit more accurately summarized the true nature of this action:

> Thus the question comes down to whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school.

Frederick v. Morse, 439 F.3d 1114, 1118 (9th Cir. 2006). "The answer under controlling, long-existing precedent is plainly 'No.'" *Id.* "Frederick argues that his rights were violated as the regulations were applied to him. Under *Tinker v. Des Moines Independent Community School District*, [393 U.S. 503 (1960)] they plainly were." *Id.* The Ninth Circuit rightly concluded that *Tinker*, not *Fraser* or *Kuhlmeier*, provides the most appropriate standard by which to analyze Petitioners' conduct. This Court made clear in *Fraser* and *Kuhlmeier* that

the greater deference afforded to school authorities in those decisions were limited to student speech in a setting wholly controlled by the school.

As Chief Justice Burger stated in *Fraser*: "The determination of what manner of speech **in the classroom or in school assembly is inappropriate properly rests with the school board.**." 478 U.S. at 683 (emphasis added). "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."*Id.* at 685. In *Fraser*, the speech was given on campus at an assembly which students were required to attend as part of an educational program on self government. *See id.* at 677.

As Justice Brennan said in his concurrence in *Fraser*:

> The Court today reaffirms the unimpeachable proposition that students do not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" Ante, at 3163 (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969)). **If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate,** see *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971);the Court's opinion does not suggest otherwise.

Fraser at 688 (Brennan, J., concurring)(emphasis added). Consequently, *Fraser* cannot be used to justify Petitioners' actions in punishing Mr. Frederick's off-campus conduct at a

community-wide event.

Similarly, in *Kuhlmeier*, this Court emphasized that its deference to school authorities was based upon the authorities' control over curriculum. 484 U.S. at 270-271.

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Id. The student newspaper at issue in *Kuhlmeier* was in the latter category over which "[e]ducators are entitled to exercise greater control" over content. *See id.*

"This concern for the integrity of the school's imprimatur" underlying the decisions in *Fraser* and *Kuhlmeier* "should not arise with off-campus speech by students," such as Mr.

Frederick's conduct.[9] "In recent Establishment Clause cases, the Supreme Court has held that school buildings themselves do not lend the imprimatur of state sponsorship to religious groups that meet on the premises after the close of business."[10] "Certainly a student who has left the building should not have her speech regulated for fear that it will be mistaken for the school's message."[11] Moreover, a student like Mr. Frederick, who is not even on campus nor part of a group identifiable with the school, should not be punished for conduct school officials fear might be attributed to them and might be seen as a statement against school policy. "Schools have no substantial interest in regulating communications which no one could associate with school sponsorship or endorsement." [12]

Consequently, Petitioners have no substantial interest in regulating, let alone punishing, Mr. Frederick's conduct. Mr. Frederick and the others who held the sign were standing on a public sidewalk among hundreds of other people at a privately sponsored community-wide event. There is no evidence that Mr. Frederick or his associates were identifiable as high school students, or that the banner could in any way

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[9] *See* Caplan at 150.

[10] *Id.* (referencing *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Education of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990)).

[11] *Id.*

[12] *Id.* at 150.

be identified as affiliated with the school. The only people who might have known that Mr. Frederick or others were students were school administrators and fellow students. Ironically, it likely that no one would have associated Mr. Frederick and his banner with the school if Petitioners had simply left it alone. By very publicly ripping the banner out of Mr. Frederick's hands and suspending him for ten days, Petitioners created the very controversy which they claim was caused by Mr. Frederick. Petitioners cannot justify a complete reversal of nearly forty years of student speech precedent based upon this self-inflicted injury.

IV. THE CONSEQUENCES OF THIS COURT'S RULING WILL HAVE FAR-REACHING EFFECTS ON FREE SPEECH RIGHTS.

The potential reach of this case goes far beyond the streets of Juneau or the campus of its high school. This Court's decision could dramatically affect how the First Amendment is perceived by those who will be leading our country in the future. If Petitioners' viewpoint is adopted, then students will learn that the First Amendment's guarantee of freedom of speech is little more than a platitude, something available only to those who are not public school students. School districts will be able to silence any expression by any student or organization with whom district officials disagree, no matter where it occurs, so long as the district can claim that the expression conflicts with its self-defined core educational mission.

> Public school students subject to school discipline for off-campus speech will find themselves constantly monitoring their thoughts and statements. Students

> would have to watch their words when in traditional public forums like parks or sidewalks, when publishing in newspapers or on the Internet, and when speaking to friends in the privacy of their own homes.[13]

Under the regulatory framework proposed by Petitioners, students could face punishment for engaging in any number of activities long protected by the First Amendment. Justice Brennan summarized some of these possibilities in his dissent in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988):

> Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "socialism is good,"subverts the school's inculcation of the message that capitalism is better. Even the maverick who sits in class passively sporting a symbol of protest against a government policy, *cf. Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral position at odds with the school's official stance might

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[13] Caplan at 148-149.

> subvert the administration's legitimate inculcation of its own perception of community values.
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> If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," *id.*, at 511, 89 S.Ct., at 739, that "strangle the free mind at its source," *West Virginia Board of Education v. Barnette,* 319 U.S. [624], 637, 63 S.Ct.[1178], 1185[(1943)].

Kuhlmeier, 484 U.S. at 279-280 (Brennan, J., dissenting). Furthermore, under Petitioners' expansive view, students who engage in expressive conduct off campus could face similar censorship. For example, a student who is satisfying a community service requirement by volunteering at a crisis pregnancy center could face punishment if he holds a sign saying "Abortionists are Murderers," or a poster depicting an aborted baby while picketing outside an abortion clinic. Students would have to think twice before participating in events such as the "Walk for Life" for fear of being suspended or otherwise punished if they express an opinion that makes school administrators uncomfortable. Under Petitioners' extra-deferential standard, school officials could define their core educational mission to ensure that unpopular, controversial, non-majority viewpoints are restricted or excluded with impunity, so long as the school could say that the message was incompatible with the mission.

The Third Circuit addressed just such a policy and its ramifications in *Saxe v. State College Area School District,* 240 F.3d 200 (3d Cir. 2001). In *Saxe*, the Third Circuit struck

down a district's "anti-harassment" policy as facially unconstitutional. The policy stated that "disrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well being of the individual." *Id.* at 202. The policy broadly defined harassment as including any unwelcome verbal or physical conduct which offends, denigrates or belittles someone because of that person's actual or perceived race, religion, color, national origin, sexual orientation, disability or other personal characteristic. *Id.* at 202-203. The policy applied to the school community, which, by the policy's terms, "includes, but is not limited to, all students, school employees, contractors, unpaid volunteers, school board members, and other visitors." *Id.* at 203 n.2. The policy at issue in *Saxe* followed the standards requested by Petitioners here – it prohibited a wide range of speech and conduct by virtually anyone who was involved with the school in virtually any setting. Such broad language is constitutionally impermissible in that it sweeps too broadly and chills protected First Amendment activities. *Id.* at 216-217. The consequences of such a sweeping regulation were aptly described by Justice Alito in his majority opinion:

> By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse – the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it

> induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" Texas v. Johnson, 491 U.S. 397, 408-09, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed.1131 (1949)).

Saxe, 240 F.3d at 211.

> Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.

Id. at 217. One commentator noted that viewpoints on topics included in the *Saxe* policy (and in Mr. Frederick's banner) "that relate to live political debates in the adult community are entitled to stronger protection."[14] "Not allowing debate among students over these issues, by silencing those who dissent at an early age, presents the danger of skewing the

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[14] Peterson at 953.

debate toward one side or the other in the adult community."[15] "One must also take account of the fact that most high school students will be of voting age before many of these issues are resolved."[16] In fact, in this case, Mr. Frederick was already of voting age when the incident occurred.

Adoption of Petitioners' proposed "subjective approach of allowing public schools to suppress any student speech which conflicts with a school's basic educational mission leaves the student's right to free expression vulnerable to the particular likes or dislikes of public school officials. The result of this subjective approach is a move toward orthodoxy."[17] That is precisely what this Court has steadfastly refused to permit.

> The Supreme Court has long held that the First Amendment means that, "above all else, the . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." In other words, the government cannot regulate speech simply because it does not like the viewpoint being expressed. Throughout the history of expression in this country, the First Amendment has protected the minority from being suppressed by the majority. [18]

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[15] *Id.*

[16] *Id.*.

[17] *Id.* at 977.

[18] *Id.* at 960-961 (citing *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)).

That protection has been extended to public school students so long as their speech is not vulgar or lewd and does not cause a material and substantial disruption. *Tinker*, 393 U.S. at 514. Petitioners are asking this Court to overturn *Tinker* and to place the future of free speech for public school students under the unbrid'ed discretion of school administrators. The danger of this viewpoint is apparent, for "[i]f minority views can be permanently suppressed because the majority disagrees with them, the First Amendment has been flipped on its head."[19] If, as Petitioners propose, a school can automatically ban an expression simply because it is controversial or inconsistent with its self-defined goals, and not because it causes material and substantial disruption, then *Tinker* has no significance. In the larger context, "[i]f the government is allowed to begin drawing some lines based on the content of speech (the very thing the First Amendment is meant to protect), the government will not be stopped from drawing other lines based on the content of speech."[20] "There is a serious risk of this because, under a movement that bans unpopular expression, the only way to determine whether a certain viewpoint is no longer worth protecting will depend on whether the majority of society believes its basic premise to be false."[21]

In the context of student speech, as elsewhere,"[f]ree speech is not a privilege that the majority can give to those whose message they like and deny to others whose words

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[19] *Id.* at 954.

[20] *Id.* at 961

[21] *Id.*

offend."[22] "Free speech is a right given to every citizen of the United States and it is the government's duty to protect that right for every person, whether they agree with their views or not,"[23] rather than to seek to expand government censorship under the guise of preserving an undefined educational mission, as Petitioners did here.

"Public high school students deserve to have the First Amendment protection that was given to them in *Tinker v. Des Moines Independent Community School District.* Students should have the right to express their viewpoints on controversial political subjects such as sexuality, religion, and race without the interference of school officials – as long as students do not do so in a vulgar manner or cause material and substantial disruption." [24] That is particularly true when

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[22] *Id.* at 963.

[23] *Id.*

[24] Peterson at 977. While the term "material and substantial disruption" has not been precisely defined by this Court, examples from student speech cases provides some guidance and show that Mr. Frederick's conduct could in no way qualify. For example, in *Tinker*, the record showed that the armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, non-protesting students had better let them alone. There was also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker. *See Tinker*, 393 U.S. at 517 (Black, J., dissenting). Nevertheless, the majority found that the armbands did not create a material and substantial disruption sufficient to justify the district's actions. Consequently, Mr.

the student makes his expression on a public sidewalk at a public event in a manner that does not explicitly or implicitly carry the imprimatur of the school.

Whether Mr. Frederick's banner is regarded as a "pro drug" message, an "anti-religion" message or none of the above, it is protected First Amendment speech under this Court's long-standing precedents. Petitioners' very public censorship and punishment of Mr. Frederick violated the bedrock principles underlying the First Amendment. No amount of post-hoc rationalization can or should be permitted to change that conclusion.

CONCLUSION

The Ninth Circuit correctly followed this Court's longstanding precedents when it decided that Petitioners violated Mr. Frederick's First Amendment rights when they

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Frederick's off-campus conduct which did not even cause comments, warnings or a disruption of class time cannot justify Petitioners' actions.

ripped the banner out of his hands and suspended him for ten days. Petitioners' request that this Court overturn that determination must be rejected.

Dated February 20, 2007

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No. 06-278

In The
Supreme Court of the United States

DEBORAH MORSE, *et al.*,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS* CURIAE[1]

The Liberty Legal Institute is a non-profit law firm dedicated to the preservation of First Amendment rights and religious freedom. In its commitment to the protection of religious liberties of all faiths, the Institute represents religious institutions and individuals across the country. The Institute is gravely concerned that the religious freedom of students in public schools will be damaged if the Court reverses the Court of Appeals decision in the present case. The Institute and its counsel have been involved in significant litigation nationwide in the area of student religious speech.

Amicus believes very strongly that the Court's approach in *Tinker v. Des Moines Indep. Commun. Sch. Dist.*, 393 U.S. 503 (1969), is the best protection for freedom of religious speech. The Court should be very cautious when granting the government broad powers to ban speech. *Amicus* is unwilling to trade the protections *Tinker* affords religious speech for some marginal "victory" over the ambiguous message at issue in this case.

SUMMARY OF ARGUMENT

The cryptic message at issue in this case is not cause for diminishing *Tinker* and derailing almost forty years of

[1] The parties have consented to the filing of this brief. Their general letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or their counsel contributed money or services to the preparation and submission of this brief.

jurisprudence protecting the political and religious speech of students. Petitioner and her *amici* propose a dangerous test, seeking to recast *Tinker* as a subjective test satisfied by a school official's pronouncement that the school's "basic educational mission" requires suppression of the student speech at issue. This standardless discretion to censor student speech would destroy the fundamental protections in *Tinker* and sanction political and religious viewpoint discrimination. The Court cannot assume that other existing doctrines would protect student speech if *Tinker* were undermined in this way.

Public schools continue to enact broad, sweeping "neutral" speech policies without any objective evidence to support the necessity of their enactment. Public schools claim *Tinker* has no application to broad "neutral" speech censorship policies. *See, e.g., Chalifoux v. New Caney Ind. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997); *Morgan v. Plano Ind. Sch. Dist.*, 2007 U.S. Dist. LEXIS 7375 (E.D. Tex., Feb. 1, 2007). If the Court adopts Petitioner's proposed subjective test, religious speech would be censored by public schools seeking to establish "neutrality," especially given religious speech is always contrary to the "basic educational mission" because no school may adopt the advancement of religion as its mission.

If the Court wishes to reverse in this case, it could carve out an explicit exception for advocacy of the use of illegal drugs and add that explicit exception to the sexually explicit speech identified in *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). But it must be very clear about the basis for that exception. It is no part of the mission of schools to indoctrinate students on issues that are controversial among American adults. Any power to instill values in students, and any power of censorship derived from such a power to instill

values, must be confined to fundamental values necessary to preservation of a democratic system, or to specific skills and behaviors necessary to success in adult life. If schools are given a blank check to define their own missions, and then power to censor any student speech inconsistent with that mission, there will be nothing left of this Court's cases protecting freedom of speech in the public schools.

ARGUMENT

I. If the Court cannot confidently divine the meaning of the sign at issue, and if it thinks that some possible meanings are not constitutionally protected, the writ should be dismissed.

Under most of the meanings that might plausibly be attributed to it, the cryptic sign at issue in this case is clearly protected by the Constitution, even in a public school.

The sign is most plausibly understood as anti-religious, ridiculing or satirizing the basic Christian message, making fun of such commonly displayed signs as "Jesus Saves," or "John 3:16." If this is the meaning of the sign, it must be protected. Religious speech is at the very core of the First Amendment, clearly protected in public schools so long as it is not school-sponsored. *See Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001). If public schools have power to ban anti-religious speech, that same power would extend to bans on positive religious speech.

Alternatively, the sign may have been a nonsense phrase, conveying no intelligible meaning. If the Court understands the sign in this way, it is protected simply

because there is no sufficient reason to prohibit or punish it. A meaningless nonsense sign does not convey one of the few messages a school is entitled to prohibit.

Third, somewhat less plausibly, the sign may be understood as suggesting a position on the existing public debate in Alaska, which has led to repeated referenda and to litigation in the state supreme court, over private use of marijuana. If the Court understands the sign in this way, it is a protected comment on an ongoing political debate.

Finally, the petitioner school principal, and *dubitante*, the Court of Appeals, Pet. App. 3a; J.A. 25, understood the sign as promoting drug use among students in violation of the school's strong policy prohibiting student drug use. If the Court attributes this meaning to the sign, then the argument that the sign is protected in a public school context becomes much closer. Still, it is clear that the school's undoubted power to prohibit drug use does not include power to prohibit all criticism of that policy. A student presentation to the school board, arguing for a change in the school's drug policy, would undoubtedly be protected political speech, even if its very purpose was to undermine what the school defined as part of its basic mission. Even in speech addressed to other students, it is hard to imagine that every student remark, however brief, however humorous, however ambiguous, is subject to punishment if it can in anyway be construed as criticizing the school's drug policy. It is far more likely that the respondent student was punished so severely because his sign was the last straw for a principal already irritated by thrown Cokes and snowball fights, J.A. 24, 29, 36, 38, than because the sign had any real tendency to promote drug use.

If the Court thinks that one of the sign's possible meanings is unprotected, then the broad range of possible meanings suggests that this case turns on a factual issue of no particular importance – the meaning of the sign. That issue plainly does not require resolution in this Court. In the quite likely event that the Court can make no confident judgment about the meaning of the sign, the legal issues are presented only in a hypothetical and alternative way. In that event, the proper course is to dismiss the writ as improvidently granted.

What *amicus* fears most is that a loosely worded opinion, holding that students have no First Amendment right to promote drug use, will fatally undermine protection for core religious and political speech in public schools. The vague and deferential standard proposed by Petitioner and her *amici* invites this consequence. Any holding that Respondent's sign is unprotected must be very carefully stated to avoid sending an unintended signal that would do serious damage to the free speech rights of all students, including religious students.

II. The "basic educational mission" of the school cannot be to instill religious or political conformity or to suppress speech with which it disagrees.

A. Petitioner's proposed standard would confer essentially standardless discretion to define a school's mission and then suppress all speech inconsistent with that mission.

However the Court interprets the particular sign at issue in this case, and however it resolves the dispute over that sign, it is critical that the opinion reaffirm students' fundamental right to free speech on religious and political issues. The Court must clearly state that that right still

has broad reach and effectually protective content as applied to students in public schools. Public school officials plainly doubt the continuing vitality of that protection, and many of them would take a win in this case as a green light to censorship, unless the opinion forcefully reminds them of the yellow and red lights that still control most disputes over school censorship.

Petitioner devotes a paragraph to praising Justice Black's dissent in *Tinker v. Des Moines Indep. Commun. Sch. Dist.*, 393 U.S. 503 (1969). This paragraph reveals the aspiration to a general power of censorship and the hope that this case may be the decisive step in restoring that power.

To that end, Petitioner and her *amici* propose a dangerous test that goes well beyond what is necessary to decide this case. Their proposed test, unless clarified, threatens to seriously undermine landmark decisions of this Court, including *Tinker* and *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001). It is true, as this Court said in *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986), that a public school need not permit student speech that directly subverts the school's "basic educational mission." But it is equally true, as the Court of Appeals said below, that in the administration of this test, the school "is not entitled to suppress speech that undermines whatever missions it defines for itself." Pet. App. 12a. That approach would confer on school officials a standardless discretion to censor student speech. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

In *Bethel*, the Court's comment about undermining the "basic educational mission" took meaning from the

gratuitous sexual content of the student's speech and from the school's interest in maintaining civility and protecting younger children from offensive and age-inappropriate content. The student reaction to the speech in *Bethel* demonstrated that the speech had in fact been disruptive. Neither the student reaction nor the school's disciplinary action in *Bethel* was based on viewpoint discrimination; the student was using sexual innuendo to attract attention to his candidacy, not to express views on any issue concerning sex. He could easily have promoted his candidacy and expressed any viewpoint relevant to that candidacy without the sexual innuendo. Nothing in the holding or opinion in *Bethel* suggested any broad power to punish speech simply because the school disagreed with the views expressed.

But here the school expressly claims power to punish speech it disagrees with. Petitioner insists that the reason for censorship is precisely the communicative impact of the message expressed. She interprets Respondent's sign to promote drug use; she interprets the school's "basic educational mission" to include prevention of drug use; and therefore, she says, the student can be severely punished for displaying the sign. This is dangerous doctrine, requiring careful confinement if it is to be accepted at all. Petitioner and her *amici* seek to recast *Tinker* as a subjective test satisfied by a school official's pronouncement that the school's "basic educational mission" requires suppression of the student speech at issue.

Petitioner's proposed subjective standard is consistent with a recent approach by the European Court of Human Rights, but roundly rejected in American jurisprudence. *See Leyla Sahin v. Turkey*, App. No. 44774/98, Eur. Ct.

H.R. 299 paras. 112-21 (29 June 2004), http://www.echr.coe.int/ECHR (search by application number under HUDOC) (requiring no evidence that banning students from wearing the traditional Muslim headscarf at a University is necessary to protect a real government interest independent of Turkey's subjective assertion that banning the scarf was in the best interest of the government). The *Sahin* case is remarkably similar to the legal proposal of Petitioner and her *amici*. The government, or the school, gets to define its mission on terms of its own choosing, and then to prohibit all expression inconsistent with that self-defined mission.

With all due respect to the European Court of Human Rights, *amicus* prefers the American jurisprudence on this issue, which holds government to a heavy burden of justifying suppression of speech. *See Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 183 (1999) ("The Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); *Reno v. ACLU*, 521 U.S. 844, 879 (1997) ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . "); *Edenfield v. Fane,* 507 U.S. 761, 770-771 (1993) ("burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480 (1989) ("The State bears the burden of justifying its restrictions . . . "); *Tinker v. Des Moines Ind. Community Sch. Dist.,* 393 U.S. 503, 509 (1969) ("In order for the State in the person of

school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

B. Suppression of speech inconsistent with a school's mission, if tolerated at all, must be confined to uncontroversial parts of the school's mission.

If the Court is willing to accept some version of Petitioner's proposed doctrine with respect to messages thought to promote drugs, then it must be very careful to state what is special about drugs, and to draw clear boundaries between those few student messages that can be suppressed and the student speech that retains constitutional protection. Any viewpoint standard so vague as undermining "the basic educational mission" requires judicial clarification at the inception.

The school's capacity to adopt a viewpoint as part of its educational mission, and to suppress speech inconsistent with that viewpoint, is necessarily quite narrow. The school cannot suppress a student viewpoint as inconsistent with its educational mission unless the school is free, under our Constitution and under the political norms of a free society, to attempt to indoctrinate students into a viewpoint contrary to the student speech that is suppressed. Parents entrust the public schools with their children for important but particular purposes. Parents may expect the school to teach skills and values conducive to success in later life, and they may expect the schools to teach fundamental democratic values. But they do not expect the schools to indoctrinate their children on current

political or religious questions that may be the subject of substantial disagreement among the parents themselves, either locally or nationally. Indoctrination on that sort of question is no part of the school's "basic educational mission," and the schools have no power to censor nondisruptive student speech on such questions.

American political norms certainly, and the Constitution at least with respect to means, prevent the public schools from propagandizing students on controversial political or religious issues. The school cannot prohibit Republican speech, or Democratic speech, or anti-war speech, or pro-war speech, or define such speech as inconsistent with the school's mission. No set of American parents accepts it as part of the public school's role to indoctrinate their children on controversial political issues, and no set of American taxpayers accepts such partisan indoctrination as a legitimate expenditure of education funds. As this Court has long recognized, neither political nor religious indoctrination is part of any school's basic educational mission:

> Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 641 (1943). If the Court is to permit viewpoint-based censorship on the basis of any such amorphous test as inconsistency with the school's "basic educational mission," it must emphatically reaffirm *Barnette*'s insight that inducing political conformity cannot be any part of the school's mission.

The point is more frequently litigated with respect to religion than with respect to politics. This Court has repeatedly held for nearly half a century that it is no part of the mission of public schools to inculcate religion among students. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *School Dist. v. Schempp*, 374 U.S. 203 (1963). Because religious instruction is not part of a school's basic educational mission, speech on religious questions does nothing to undermine a school's educational mission. Therefore, voluntary religious speech and voluntary anti-religious speech is fully protected in public schools.

Nor can the school prohibit all political speech, or all pro-religious and all anti-religious speech, and claim that even-handed suppression is part of its basic educational mission. It is no part of the school's basic mission to stamp out student interest in political or religious controversies or to suppress student participation in such controversies. *Tinker* flatly prohibits such a "neutral" ban. *Tinker* is expressly not limited to viewpoint discrimination. "If a regulation were adopted by school officials *forbidding discussion of the Vietnam conflict*, **OR** the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513 (emphasis added).

Petitioner and her *amici* place much reliance on *Ambach v. Norwich* and its paean to "the importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on

which our society rests." 441 U.S. 68, 76 (1979). But of course one of the central roles of citizens in our system is to participate actively and intelligently in political debates. The people are sovereign in our system, and the people are ultimately responsible for the choice of their political leaders and for the policy choices made by those leaders. It is an essential part of a public school's mission to prepare students for this responsibility. It can never be part of a school's "basic educational mission" to suppress student interest or participation in political or religious discussion.

Ambach also describes public schools "as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground," and "as inculcating fundamental values necessary to the maintenance of a democratic political system." *Id.* at 77. Of course, freedom of speech is precisely one of these fundamental values "necessary to the maintenance of a democratic political system."

More generally, this "assimilative" function of public schools is necessarily confined, as the Court said in *Ambach*, to values that are "fundamental" and "necessary" to a democratic system, and to a "broad . . . common ground." Let this "assimilative" function expand to values that are less fundamental, less essential to a democratic system, narrow rather than broad, and the public schools would become an engine for instilling conformity and for suppressing discussion of public issues. Representative government, majority rule (subject to protection for individual and minority rights), nondiscrimination and equal protection of the laws, freedom of speech, religion, and assembly, tolerance of dissenting views and of personal and group differences, due process of law, innocent until

proven guilty – these are the kinds of values that may be fairly described as "fundamental" and (the most important of the *Ambach* criteria, because it provides the most real guidance) as "necessary to the maintenance of a democratic political system." And these are not values that provoke much disagreement in principle among American adults, however great the disagreements over particular applications. It is indeed part of the "basic educational mission" of public schools to instill these broad values in each succeeding generation. How far a school may go in suppressing student dissent from one or more of these values is a much closer question, but that question is not presented in this case.

It cannot be part of the school's mission to go beyond such broad and fundamental principles to instill agreement on, or suppress dissent on, more particular social, political, or religious issues. The school cannot define suppression of dissent as part of its educational mission. It cannot justify suppression of dissent by defining its basic educational mission to include instilling support of particular or current government policies or administrations. Nor can it justify suppression of all religious speech, pro and con, because the school's mission does not involve religious speech of its own. And this Court should say so.

A school may also seek to instill uncontroversial personal virtues that have the overwhelming support of the American people and that are often as important as academic skills to success in adult life: honesty, diligence, personal responsibility, obedience to law, tolerance for dissenting views. The Court may conclude that avoidance of drugs is such a virtue. That sort of socialization into responsible adulthood is consistent with American political

norms. But again, this sort of socialization is no justification for suppressing controversial religious or political speech on contemporary issues, even if both sides are equally suppressed.

III. The reasons why the Court might permit suppression of speech promoting drugs have nothing to do with suppression of religious or political speech.

If the Court wishes to reverse in this case, it could carve out an explicit exception for advocacy of the use of illegal drugs and add that explicit exception to the sexually explicit speech identified in *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). But it must be very clear about the basis for that exception.

If a school can prohibit the speech at issue in this case, it is because the school has a valid rule prohibiting students from using drugs, and because Respondent's sign might be interpreted as encouraging student violations of the valid rule of conduct. The use of drugs is a criminal offense, and whatever disagreement there may be about the efficacy of the drug laws, or about the need for laws against adult use of the less dangerous illegal drugs, there is overwhelming consensus in the polity that adults should discourage children from using drugs. As a corollary of its power to regulate serious misconduct, the schools may plausibly have power to prohibit student speech urging serious misconduct.

Of course this corollary does not follow in the adult world. But if the Court thinks the corollary does follow in public schools, it must state clear and objective reasons that confine the decision. The school is engaged in educating

children, and it may seek to educate them about the reasons for its conduct rules. Assuming the conduct rules themselves are not politically or religiously controversial, the Court may conclude that the school may seek to persuade students to believe in these rules and to accept them as norms of behavior. And because children are younger and on average have less impulse control than adults, the school may believe that urging violations is more likely to lead to violations, and that the speaker who persuades a child to violate a rule bears more responsibility for the resulting violation than a speaker who persuades an adult to violate a rule.

These are reasons why the Court might conclude that the age of the students and the educational context may justify restrictions on *advocacy of prohibited conduct* in public schools. But if the Court so rules, it must clearly distinguish this case from *Tinker* and *Good News* and from political and religious speech. Nothing in these reasons for restricting advocacy of student misconduct justifies restrictions on advocacy of controversial political or religious views.

The Court of Appeals said that no government mission is more important than war, so if anti-war speech is protected, pro-drug speech must also be protected. Pet. App. 8a. But that is not the right basis for comparison. If there is a difference between drugs and war, it is that war is not part of the *school*'s mission. The decision to go to war, like most other disputed political decisions, is entrusted to government institutions other than schools. Education of children, and protecting children from self-destructive behavior, is at the core of the mission entrusted to schools. A decision permitting the schools to censor student speech promoting the use of drugs implies

nothing about the schools' power to censor student speech on political issues entrusted to other organs of government, or on religious issues entrusted to churches and synagogues, families, and individual conscience.

IV. *Tinker* is an essential and independent protection for student speech; no other doctrine can safely substitute.

Within the confines of *Tinker*, school officials bear the burden of demonstrating that suppression of student speech is necessary to prevent a material and substantial disruption. *See Tinker v. Des Moines Indep. Commun. Sch. Dist.*, 393 U.S. 503, 509 (1969). This is a wise balance, protecting student exchange of ideas as part of their education in a democratic society, but permitting government intervention for conduct and that occasional speech that actually disrupts the school. Petitioner seeks to overturn this burden and eviscerate decades of First Amendment jurisprudence following *Tinker* by asking this Court to grant unfettered discretion to school officials to ban speech that the school subjectively determines is inconsistent with its educational mission.

At its heart, Petitioner's proposal is to substitute her basic-educational-mission standard for the substantial-disruption standard of *Tinker*. For the reasons already stated, the basic-educational-mission standard would, unless carefully confined by this Court, give school officials broad discretion to censor student speech. The Court cannot assume that other existing doctrines would protect student speech if *Tinker* were undermined in this way.

The rules against viewpoint discrimination are no protection against rules that simply seek to eliminate

controversy by suppressing all speech on any side of an issue. The infamous resolution banning all "First Amendment activities" in the airport was adopted precisely because of its viewpoint neutrality. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (striking down the resolution as overbroad). A rule banning student discussion of politics, or of religion, or of particular political or religious issues, could be viewpoint neutral and not so flagrantly overbroad.

More fundamentally, Petitioner's proposed rule can only be understood as overriding the rule against viewpoint discrimination. A ban on speech promoting drug use is a ban on a particular viewpoint. Petitioner's claim is precisely that she can engage in viewpoint discrimination whenever her school rejects a viewpoint in pursuit of its "basic educational mission."

Nor will public forum doctrine fill the gap. Public forum rules are no help in those parts of the school that are not a part of a public forum, and schools fiercely deny that even their student activity periods are a public forum, let alone the rest of the campus and the rest of the school day. Public forum doctrine is no help when schools close their forum to avoid permitting religious speech, as happened in *Child Evangelism Fellowship, Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006).[2] One of the reasons *Tinker* is so important is that it is not entangled in public forum doctrine:

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[2] Another example is *Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994). Events on remand are not reported, but there the school board succeeded in its strategy of closing the forum.

> *Tinker* did not involve a question of access to public property. When citizens claim a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is especially appropriate for speech. The various versions of the public forum doctrine address these questions. But public forum analysis is irrelevant when access is not at issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. Because students were indisputably entitled to be on the school grounds, the only question in *Tinker* was whether the school had a constitutionally sufficient reason to suppress their speech. The Court's requirement that the school show a material and substantial interference with the educational function is addressed to that question.

Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 48 (1987); *see Jews for Jesus*, 482 U.S. at 573 (recognizing that *Tinker* might apply without regard to property's status as a public forum).

Petitioner proposes to eviscerate *Tinker*. If a vague educational-mission test is substituted for the material-disruption test, without firm guidance from this Court about the limited nature of the educational missions intended, student speech will be at the mercy of unrestrained school administrators.

V. Public schools have repeatedly shown that they will use their discretion to censor student speech.

If the Court weakens *Tinker* and gives government school officials the power to censor speech "contrary to the educational mission," schools may define broad missions and enact correspondingly broad prohibitions on speech, inevitably including content-based and viewpoint-based discrimination. This unfettered discretion in the hands of school officials creates two dangers, in addition to controverting any purpose to prepare students to live in a democratic society where the exchange of ideas is the country's lifeblood. First, broad discretion to enact speech regulations "intimidate[s] parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Pbl'g Co.*, 486 U.S. 750, 757 (1988). Second, unfettered discretion permits government officials "to roam essentially at will, dispensing or withholding permission to speak . . . according to their own opinions regarding the potential effect of the activity in question on the 'welfare' of the community." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). A school official accused of viewpoint discrimination will easily avoid judicial scrutiny by claiming that the speech censored was contrary to the educational mission of the school as defined in the context of its local community. Rampant viewpoint discrimination will be the result, and it will occur without any possibility of a remedy.

Religious speech would be among the first banned as out of compliance with the school's mission. Schools continue to claim that the Establishment Clause requires or justifies them in censoring religious speech, on grounds derived from their own confused definition of their mission.

No school may adopt as part of its mission the advancement of religion. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985). That would violate the Establishment Clause. This leads many schools to conclude that any student religious speech is therefore inherently inconsistent with the educational mission of the school and should just be done elsewhere. If this Court accepts an "educational mission" standard, without clearly reaffirming the limits on how schools may define that mission, student religious speech will be an immediate target.

The fears expressed in this brief are not hypothetical. We know from experience that if this Court permits censorship based on a broad discretionary standard like that proposed by Petitioner and her *amici*, public schools will invoke that standard to censor religious and political speech at the core of the First Amendment.

Many schools have persistently sought to suppress student religious speech in violation of this Court's decisions. *See, e.g., Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (same problem at university level). There is a litany of cases in every circuit enforcing these decisions against resistance by public schools.

Amicus has handled a legion of cases where schools ban student religious speech under allegedly "neutral" anti-speech policies that can only be stopped by *Tinker*. Currently pending examples include *Morgan v. Plano Ind. Sch. Dist.*, 2007 U.S. Dist. LEXIS 7375 (E.D. Tex., Feb. 1, 2007), and *Pounds v. Katy Ind. Sch. Dist.*, 4:06-cv-00527

(S.D. Tex.). In *Plano*, students were told they could not share candy canes with their friends, they could not write "Merry Christmas" in "holiday cards" to military troops serving in Iraq, and they could not share pencils with their friends that bore a religious message. In *Katy*, a student was told she could not talk about Jesus during recess. During a class discussion led by the teacher asking students to say what comes to mind when the teacher says the word "Easter," students responded with words such as "bunnies," "eggs" and "jelly beans." One student responded with the word "Jesus." The teacher told her that such an answer was inappropriate at school.

All of these bans were justified under allegedly "neutral" policies banning speech – policies that can best be overcome with *Tinker*, and perhaps only with *Tinker*. These schools plainly think it part of their "basic educational mission" to preserve a religion-free zone. A deferential standard, permitting censorship on the basis of whatever schools declare to be their mission, would go far to validate such policies. If protecting the mission justifies viewpoint discrimination, it would no longer matter whether these schools can plausibly claim that their policies are neutral.

Counsel for *Amicus* also participated extensively in *Chalifoux v. New Caney Ind. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (discussed favorably in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211-12 (3rd Cir. 2001) (Alito, J.)). In *Chalifoux*, the school district instituted a policy prohibiting rosary beads. The school district believed rosary beads to be a symbol used to identify gang affiliation. The Catholic plaintiffs in *Chalifoux* certainly would find no refuge in either viewpoint or public forum jurisprudence, because the ban on rosaries allegedly had

nothing to do with their religious significance, and because the plaintiffs possessed their rosaries wherever they went, including in the classroom, which courts are reluctant to describe as a public forum.

Without *Tinker*, the students would have been banned from possessing rosaries. If *Tinker* were circumscribed to allow schools to censor any speech inconsistent with its educational mission, the school could ban rosaries or any other religious symbols or expression as inherently inconsistent with the school's secular mission. Only a strong *Tinker* fully protects religious speech in schools.

Tragically, a federal judge, refusing to apply *Tinker*, recently opined that *Tinker* is limited to viewpoint discrimination cases, which he defined narrowly, en route to upholding a broad sweeping ban on student religious speech. *See Morgan v. Plano Ind. Sch. Dist.*, 2007 U.S. Dist. LEXIS 7375 (E.D. Tex., Feb. 1, 2007). Far worse would follow if this Court authorizes school districts to suppress any speech they define as inconsistent with their mission. It is critical that this Court reaffirm that the fundamental right to free speech on religious and political issues still has broad reach and protection.

CONCLUSION

Amicus urges the Court to be very careful and explicit in its decision, which could have enormous implications, intended or not, for religious and political speech. If the Court accepts any form of Petitioner's proposed basic-educational-mission standard, the Court must expressly state the First Amendment limits on a school's capacity to define its own mission for purposes of censoring speech inconsistent with that purpose. The Court should reaffirm *Tinker*, and any exception to *Tinker* should be narrowly confined.

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No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE, *et al.*,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP AND THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

The National Coalition Against Censorship ("NCAC" or "Coalition") is an alliance of more than 50 national non-profit organizations that includes literary, artistic, religious, educational, professional, labor, and civil liberties groups.[2] Founded in 1974, the NCAC has educated thousands of artists, authors, teachers, students, librarians, readers, museum-goers and others around the country about the dangers of censorship and how to oppose it by providing advice and information. The NCAC's quarterly newsletter, *Censorship News*, currently reaches 32,000 readers in hard copy and many more online. The NCAC provides information packs on a wide range of free expression issues, as well as assistance responding to censorship.

The NCAC has a particularly strong interest in voicing its opinion where, as here, students' free speech is at stake. Indeed, the NCAC is committed to supporting both teachers and students in their struggle for free speech. For example, the NCAC recently aided a teacher in Rhode Island whose

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part, and no person or entity, other than *amici curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have given blanket consent to the filing of all amici briefs in this case, in letters of consent filed with the Clerk of this Court.

[2] Among NCAC's 52 members are the American Association of University Professors, American Civil Liberties Union, American Federation of Television & Radio Artists, American Society of Journalists & Authors, Association of American Publishers, Children's Literature Association, National Education Association, and the Screen Actors Guild. The views presented in this brief, however, are those of the NCAC alone and do not necessarily represent the individual views of any of its members.

school principal demanded rationales for teaching "controversial" books. The NCAC also assisted a group of high-school students from Long Island whose school library canceled a subscription to a teen magazine (*Seventeen*) after some parents complained about the frank advice in its health and body columns.

The American Booksellers Foundation for Free Expression ("ABFFE") is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech. ABFFE is actively involved in opposing censorship of student expression. Its membership includes nearly a thousand booksellers from around the country, many of whom lead the fight against censorship in their local schools and communities.

The NCAC and ABFFE submit this brief as *amici curiae* because they are concerned about the rising number of incidents of censorship of student speech due in part to misapprehension or misapplication of this Court's precedents and, in particular, due to an unduly broad reading of *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) ("*Fraser*"). School administrators, like the district court in this case, have read isolated phrases in *Fraser* as authorizing school officials' censorship of any message they deem contrary to their undefined, unreviewable notion of the "educational mission of the school."

For example, a nine year-old boy in Bedford County, Virginia was asked to remove from his book bag a "North-for-Senate" bumper sticker and a pin opposing the Clinton-Gore presidential ticket. The school also confiscated from the student a Rush Limbaugh newsletter and book he was reading during recreational reading time. *See* Jamie C. Ruff,

Bedford, Pupil Settle Suit Over Limbaugh Book, RICHMOND TIMES DISPATCH, Aug. 13, 1997, at A1. A seventeen-year-old student in Brooklyn was pulled out of class, searched, and told she could not wear a t-shirt and pin that showed the Palestinian flag, or display pro-Palestinian stickers, although the school later reversed its decision. *See* Darcia Harris Bowman, *Principals Walk Fine Line on Free Speech*, EDUC. WEEK, Mar. 19, 2003, at 1. A senior at Bay City Central High School in Michigan was suspended for five days for wearing a t-shirt with the anarchy symbol printed on the front. The student had also previously been either suspended or forced to remove shirts displaying peace signs, upside-down American flags, and an anti-war quote from Albert Einstein. It was only after the student enlisted the help of the local ACLU that his suspension was set aside. *See* Press Release, ACLU, Michigan School Reverses Student's Suspension For Wearing "Anarchy" T-Shirt (May 10, 2004), *available at* http://www.aclu.org/studentsrights/expression/12846prs20040510.html. In April 2006 in Richmond, Virginia, two elementary school students, aged 5 and 8, were kept from class for wearing t-shirts bearing the message "Latinos Forever." *See* Press Release, ACLU, ACLU of Virginia Seeks Guarantee of Student Free Speech in Prince William Schools (Apr. 24, 2006), *available at* http://www.aclu.org/studentsrights/expression/25325prs20060424.html.[3]

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[3] *See also, e.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 466, 469-71 (6th Cir. 2000) (upholding under *Fraser* the prohibition of a Marilyn Manson t-shirt, despite lack of evidence of potential disruption, and despite fact that Slayer and Megadeath shirts were allowed, as were backpacks with Marilyn Manson patches, on grounds that shirt was "offensive" because the band "promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school"); *Chandler v. McMinnville Sch.*

(cont'd)

In the cases cited here, as well as in countless others around the country – cases that remain unreported and unnoticed by the public at large – school officials censor student speech simply because they consider the student's message inappropriate or contrary to the administrator's view of the school's mission. While *amici* do not address the qualified immunity issue in this case, they submit this brief to caution the Court about expanding the ruling in *Fraser* in a manner that would allow school officials such broad, undefined authority. *Amici* also urge the Court to resist expanding the applicability of its school speech jurisprudence to speech that occurs off school premises and that happens to be made by a student. It is a fundamental precept of our democracy that speech perceived to be bad or harmful is to be counteracted with more speech, not by official censorship. Nowhere is this principle more critical than in our nation's public schools, where young people learn by example and are taught to engage in active, reasoned decision-making rather than to become passive recipients of enforced thinking.

SUMMARY OF ARGUMENT

Petitioners ask this Court to apply its student speech precedents to a setting where the Court has never yet applied them: off-campus or, as *Tinker* so famously characterized it, beyond the "schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Petitioners

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Dist., 978 F.2d 524, 530 (9th Cir. 1992) (reversing a district court holding that school was entitled to prohibit "scab" buttons during teacher strike because under *Fraser*, school had the right to decide that buttons were "inherently disruptive"); *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796 (D. Idaho 1987) (upholding under *Fraser* the suspension of student who wore a t-shirt parodying school administrators drinking alcohol on school property, noting that t-shirt was "clearly offensive" and "clearly" falling under *Fraser*).

attempt to present this case as yet another student-speech case, but the student here was an 18-year-old adult who stood on a public street holding a banner during a public event with the intent to have the banner broadcast on television. He had not yet arrived at school or on school premises that day, and in fact was later disciplined for truancy. He stood with members of the public as well as students on the street where a public event, the Olympic torch relay, was occurring during school hours.

In none of its prior precedents has this Court extended the authority of school officials beyond school premises. This case is not the occasion for the Court to do so. The record on which the district court granted summary judgment to the school officials does not support the finding that the watching of the Olympic torch relay, by Respondent or by any other student, was part of a school-sponsored event. At most, the school sanctioned a "free period" in which students were allowed to watch the torch relay during school hours if they so chose. Some teachers dismissed classes in order to allow students to watch the relay, but there is no record evidence that the students whose classes were so dismissed were required to watch the relay, that they stood together as a class under supervision of their teacher, or that they were required to stay on school grounds. Nor is there evidence that watching the Olympic relay was connected in any way to a curricular subject or activity of the school.

To the contrary, the record supports that the dismissed students were not required to watch the relay, and were simply told to come back to the next class period at a particular time. Many students in fact left school premises before the relay passed, and were not stopped from leaving by school officials. According to the school's teachers, the students who did watch the relay were not required to remain together as a group, and the teachers were only interspersed with the students. Any suggestion that they were under the

active supervision of their teachers is belied by the record evidence that prior to Frederick's unfurling of the banner, there were several students who were throwing snowballs and *beverage bottles* at one another, without any record support that teachers sought to control the unruly and dangerous behavior or to discipline students for it thereafter.

The court below was therefore correct in vacating and remanding the district court's grant of summary judgment to school officials. Rather than analyzing school officials' conduct with respect to Respondent's speech under the student-speech precedents, however, the court below should have concluded that Respondent's speech was not on school premises or otherwise subject to school officials' discipline or supervision. At a minimum, before concluding that Respondent's or other students' watching of the relay was part of a school-sponsored event, the court below should have vacated and remanded to the district court for purposes of further amplifying the record with regard to the level of school supervision and other undeveloped factual issues.

Even if the school officials' actions with regard to disciplining Respondent's speech is ultimately properly construed under this Court's student-speech precedents, the First Amendment analysis of the decision below should be affirmed. It is undisputed that Frederick's speech caused no material disruption to classroom work, to school activities or to the rights of others in school. The Court should reject Petitioners' and the Government's dangerous invitation to read *Fraser* and its other student-speech precedents broadly so as to allow school officials to prohibit student speech simply because such speech may undermine, or may be inconsistent with, the school's educational mission or the school's own message. Such a broad reading would invert the basic principles of this Court's student-speech cases, and would make student free speech, rather than school censorship, the exception. Such a reading would give to

school officials. While school officials have inherent authority to promote particular messages through their own speech and through school-sponsored student speech, they do not possess broad license to censor discordant messages by individual students.

This is not a case about illegal drugs or about the public schools' laudable efforts to reduce illegal drug use among American teenagers. *Amici curiae* share Petitioners' and the Government's commitment to promoting the health and well-being of our nation's youth by discouraging illegal drug use, including through the school officials' own speech. But this is a case about student speech – and specifically whether suppression of disfavored messages concerning illegal drug use is an effective, or constitutionally permissible, means of achieving shared ends. Nothing in the Safe and Drug Free Schools and Community Act suggests that the goal of drug-free schools should (or would effectively) be promoted by limitations on student speech. Indeed, in our society, we have long adhered to the fundamental principle that the way to counteract bad speech is through more speech, not suppression. *Amici curiae* urge the Court to reinforce that critical message for our nation's youth, thereby encouraging them to develop the critical faculties necessary for reasoned decision-making in our democratic society and for strong, sustained life choices.

ARGUMENT

I. SCHOOL OFFICIALS' DISCIPLINE OF RESPONDENT'S SPEECH SHOULD BE ANALYZED UNDER ORDINARY FIRST AMENDMENT PRINCIPLES, AND NOT PURSUANT TO THIS COURT'S STUDENT-SPEECH PRECEDENTS.

Although the court below correctly vacated and remanded the grant of summary judgment in favor of school officials, it

incorrectly analyzed the case as a student-speech case. The court assumed that Respondent's speech here was subject to discipline by school officials pursuant to even the most speech-protective of the Court's *Tinker-Fraser-Hazelwood* trilogy of student-speech cases. But because Respondent's speech occurred off-campus, it should have been analyzed as speech entitled to full First Amendment protection outside of the "special characteristics of the school environment." *Tinker*, 393 U.S. at 506. Just as it now "can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id.*, it is equally beyond dispute that students are not limited in the full measure of their rights as citizens when outside of the schoolhouse gate.

On the basis of the summary judgment record now before it, the Court should not, for the first time, articulate a standard by which school officials may discipline an individual's off-campus speech simply because he or she happened to be a student at the time and the expression took place during school hours. At a minimum, the Court should order the case remanded to the district court for further development of record facts relating to the school officials' claim of authority over Respondent for the off-campus speech at issue here.

A. Respondent's Speech Occurred Off-Campus And Outside The Setting Of A School-Sponsored Activity.

It is undisputed that Frederick was off-campus at the time he displayed his message. He "was standing on or near a public sidewalk across the street from the high school." Pet. App. 63a. He "purposely avoided the high school grounds itself. [He] wanted to be on a public sidewalk but not on school grounds." J.A. 29. Frederick "never made it to school that morning." Pet. App. 2a. The Superintendent accused

Frederick of "failing to join his class or otherwise reporting to the office." Pet. App. 64a. But if Frederick was guilty of truancy for not joining his classmates, it cannot also be argued that he otherwise subjected himself to the school's jurisdiction while remaining off-campus. Frederick did not report himself to the office, because he was not going to school yet. Thus, according to both Frederick's intentions and the Superintendent's interpretation of the facts, Frederick was not at school at the time he unfurled his banner.

That "Frederick was a student, and school was in session," Pet. App. 6a, does not automatically mean that he was subject to the more stringent regulation of his First Amendment free speech guarantees by school officials. The court of appeals suggests the example of a "student driving a car on public streets with a 'Bong Hits 4 Jesus' bumper sticker." Pet. App. 5a. The court recognized that that scenario would be a clear case of non-student speech, but did not clearly distinguish the example from the facts of this case. Had Frederick driven with the bumper sticker on his car at the same location as where he unfurled his banner, his display of the message on his bumper sticker would almost undisputedly not fall under the category of student-speech subject to school officials' discipline.

Petitioners assert that the event had the special characteristics of the school environment based on two theories. The first is that this was a "school social event" similar to a school field trip. The second is that Frederick's speech had the imprimatur of school. Neither theory withstands scrutiny.

1. The Event Was Not a School Field Trip or Sponsored Activity.

The fact pattern in which student-speech cases typically arise occurs on school grounds – whether in the classroom,

the library, or anywhere else inside the schoolhouse gate. Under certain circumstances, *amici curiae* agree with Petitioners that certain well-established school events, such as field trips, may warrant the expansion of the definition of "on-campus speech," allowing schools to exercise their authority even outside the school's gate. But this "was not a fieldtrip, as no fieldtrip form had to be filled, and parental consent was not required." J.A. 38. Rather, this was the Olympic Torch Relay, "an event sponsored by the U.S. Olympic Committee, the Coca-Cola Company, and Chevrolet, and their local affiliates." J.A. 9 (Complaint ¶ 9).

To be sure, school "is not merely a plot of land. Numerous sporting events, drama productions, and debates are conducted off the premises of the school, but are nevertheless school activities. When the [school's] physical education class runs on [the street] because there is no athletic field at the school, students are still in school and still under the authority of their teachers and administrators." Pet. App. 63a.

But in these off-campus school-sponsored events, some, if not all, of the special characteristics of the school setting still exist. *Amici* submit that the following are among the special characteristics that might subject off-campus events to school discipline: (1) students are required to participate in the event whenever the event occurs during class hours; (2) students participate together as a group or class; (3) the activity is designed solely or primarily for students, and non-students are typically not allowed to become a part of the group; (4) an accompanying teacher is visibly present at all times, actively supervising the group, often with the help of additional accompanying adults (whether school personnel or not); (5) the event is part of a curricular activity that expands on topics taught in class (or, in the case of the physical education class, the off-campus activities cover a significant amount of what is being taught); (6) parental

permission may be required; (7) the activities lead to a situation which "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); and (8) the school allocates funds for the event. Trivializing the need to show these special circumstances runs the risk of over-extending schools' authority and constraining First Amendment protection.

In this case, the record supports the existence of few, if any, of these characteristics. On January 24, 2002, the teachers in Juneau High School released their students to watch the Olympic Torch Relay, "but we did not have to stay together or stay with the teacher," as one student testified. J.A. 34. Indeed, "the teacher made no effort to keep those of us who did go out [to watch the Relay] together." J.A. 40. "We were not required to stay together as a class. . . . We were just told to come back to our next class at a particular time." J.A. 38. "Many people got bored and left. The school administrators weren't stopping any of the people who left." J.A. 40. "The area outside the school was crowded and chaotic. . . . I noticed a few other students did not come back to class after the relay was over, and the teacher noticed their absence but they didn't get into trouble." J.A. 34.

As a result, when Frederick reached Glacier Avenue in front of the school, "there were a lot of people [there], including both students and non-students, on both sides of the street." J.A. 30. Students and non-students commingled freely. The group of people standing around Frederick contained at least one adult non-student, J.A. 30, named Eli Geil. J.A. 37, 38. Indeed, the teachers themselves admitted that they "did not insist that . . . students remain together as a group," J.A. 51, 53, 55. Thus the first, second and third "special characteristics" of the school-limiting environment – mandatory participation during class hours, students

grouped together as a class, and activity designed primarily for students and disallowing non-students as part of the group – are absent here.

Similarly, the fourth characteristic – the requirement of active supervision of the school's grouped-together class by a visible school official – is missing as well. Underscoring that school officials did not supervise or have any control over students at the event is the fact that several students threw snowballs and *beverage bottles* at one another before Frederick displayed his banner: "several snowball fights broke out," and "students started throwing [] Coke bottles at each other." J.A. 30. In fact, "a lot of the bottles were thrown back and forth." J.A. 34. And although "some school officials tr[ied] to stop the[] [fight]," they didn't have "much luck." J.A. 30. The court below found that "the uncontradicted evidence is that it [the fight] had nothing to do with Frederick and his fellow sign-holders." Pet. App. 2a. But surprisingly, the record lacks any indication that the snowball and bottle throwing incident was further investigated or that involved students were disciplined. If this was indeed a school-sponsored event, then clearly acts of violence would not have been tolerated. The record evidence findings – of unruly behavior during the event, of many student leaving, and of a general chaos with an absence of any substantial teachers' reaction – all point to the conclusion of lack of an effective and visible supervision by the school.

As for the fifth characteristic – the off-campus activity should involve an expansion of an on-campus subject – it, too, can hardly be said to exist here. Although Petitioners claim that the event had a "noteworthy educational value," Pet. Brief at 3 – implicitly comparing it to a trip to the planetarium as part of the curriculum of a science class – there is no evidence to support that it was part of the school curriculum. Quite to the contrary, other than allowing

students to view it, the relay was never mentioned in class. As one student testified, "[n]o one discussed the Olympic relay or the Olympics, including teachers, so I could not see any way in which the event would be considered an educational or school-related event. There were no assignments related to the Olympics that I ever heard of, and no discussions of it." J.A. 37; *see also* J.A. 39 (testimony by another student) ("I'm not aware of any discussion that any class held about the relay itself or the Olympics.").

With respect to the sixth and eighth characteristics – requiring parental permissions and school-allocated funds, respectively – both are absent here as well. First, as noted earlier, "parental consent was not required." J.A. 38. Second, that the school district had allocated funds to transport students from schools not along the relay route, Pet. Brief at 3, may bear significance to those schools that used those funds, but JDHS was not among them. The high school never transported any students to see the relay, nor did it allocate funds for the event in any other way.[4]

Under these facts, the court of appeals was correct in its recognition that "supervision of most students was minimal or nonexistent." Pet. App. 5a. But the court of appeals erred in concluding that the school's hypothetical ability to supervise students, even though in reality it chose not to do so, is sufficient to categorize this as a school event. The test that the court should have used was much wider, and should have considered whether all of the enumerated special characteristics actually exist in this case such that school officials could exert authority over the students.

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[4] The seventh characteristic – the requirement that the activity would be "reasonably perceive[d] to bear the imprimatur of the school" – is noticeably missing from this case as well. *See infra*, at 14-17.

Schools cannot hold the stick at both ends. Had the principal intended this to be a school-sponsored event, as she is claiming it to be, she could have required all students to remain on school property. In fact, "[m]any students chose to view the relay from vantage points on campus because the campus is higher than street level and enabled them to see over the heads of students standing on the sidewalk." J.A. 24. The principal instead elected to release the students to the public streets, and elected not to have them organized in groups with their teachers. By doing so, the principal essentially created a "free period." It should come as no surprise to school administrators that when they choose to create a free period in which students leave campus, school officials will not be permitted to exercise the same level of control over the Constitutional rights of the students as they do when they are in the classroom or on school premises.

At a minimum, the record provides insufficient evidence to conclude that Frederick was subject to the discipline of school officials. The summary judgment record contains no evidence concerning how many students remained in or left the area of the school; how many students came back to school at the time they were directed to return; how far from the school students wandered to watch the relay; how many members of the public or non-students were in front of the school commingling with the high school students; how many teachers and administrators were outside "interspersed" among the students; and what instructions, if any, teachers were given before the relay. At the very least, therefore, this Court should direct the district court to further develop the record.

2. The Banner Did Not Bear the Imprimatur of the School.

Petitioners present as an alternative the theory that Frederick's speech bore the imprimatur of school, and the

school therefore acquired disciplinary jurisdiction over it. But Frederick's location across the road from the high school, as would be seen by the television cameras and as can be seen in the picture showing the banner, *see* Pet. Cert. 70a, had private houses as a backdrop, not the school.

Occurrences at the public relay event could not have been viewed as having the imprimatur of the high school, as the event was organized by private sponsors with the support of public officials, and was not associated with the high school in any way. According to Petitioners themselves, Pet. Br. at 2-3, there was significant preparation in Juneau, Alaska. "This is a unifying force for the state, especially with the Legislature here and in session. This is an Alaskan event, not just a Juneau event," said Juneau Mayor Sally Smith. *See* Charles Bingham, *The Olympic Torch Relay comes to Juneau*, JUNEAU EMPIRE, Jan. 16, 2002, *available at* http://www.juneauempire.com/stories/011602/spo_juneaurelay.shtml.

Petitioners state that "[f]our high school students, representing various segments of the student body, acted as torchbearers. J.A. 24." Pet. at 4. But Morse, in her affidavit, claimed that the students were simply "given permission to miss class to act as Torch-bearers." J.A. 24. The suggestion that the students were somehow selected by the school, or were selected to represent the school, is flatly false. In fact, the selection of torchbearers was entirely apart from school, and was at the complete discretion of the organizers of the Olympic games. In February 26, 2001, a press release was issued by The Salt Lake Organizing Committee for the Olympic Winter Games of 2002 (SLOC), The Coca-Cola Company and Chevrolet Motor Division asking Americans to propose, through a nomination process including a 50-to-100 word essay, inspirational people who should carry the Olympic Torch. Mitt Romney, President and CEO of SLOC, stated that: "Torchbearers will be people from all walks of

life who have inspired others, whether an individual or a community. As the Flame journeys throughout America, our intention is that it will serve as a catalyst, motivating individuals to strive for excellence and achievement in their lives, effecting positive change in their own communities." Utah Educ. Network, *Coca-Cola and Chevrolet Search for Inspirational Americans to Carry Olympic Torch* (Feb. 26, 2001), http://2002.uen.org/SLC2002/body-news-1.cgi?cat_id=11338&art_id=27156.

JDHS's only contribution was to permit the independently nominated high school students to miss class. The torchbearers did not "represent[] various segments of the student body," but rather appeared in their representative capacity as having inspired others within the public at large. Although Principal Morse may have believed that "[f]ailure to react to the display would appear to give the district's imprimatur to that message," Pet. App. 3a, that belief was unreasonable in light of the public nature of the event, and the unsupervised manner in which she permitted students to watch the event commingled with the public.

When considering whether speech is likely to bear the imprimatur of schools, this Court in similar contexts has ruled that there is no concern of the "imprimatur" of government sponsorship of religion by allowing religious groups to meet in school buildings after school hours. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). Certainly, then, the imprimatur of school cannot be found when the speech occurs off-campus but during school hours. The remote likelihood in certain situations that one might associate a student's speech with the school's speech when the speech was made off-campus clearly doesn't warrant the silencing of the student. As this Court has held, "[w]e think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory

basis. The proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of the Westside Comty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) (citations omitted).

B. The Court Should Apply Full First Amendment Protections To Student Speech Occurring Outside The Schoolhouse Yard And Not Connected To A School Event.

For good reason, expression by students such as Respondent that was created and distributed or displayed off-campus enjoys full First Amendment protections. *See, e.g., Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044-45, 1050 (2d Cir. 1979) (*Tinker* not applied because underground newspaper not distributed at school; "our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate"); *Shanley v. Ne. Indep. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960 (5th Cir. 1972) (underground newspaper distributed outside school causing no disruption in school cannot be subject to school's disciplinary authority); *cf. Boucher v. Sch. Bd.*, 134 F.3d 821, 822, 827-29 (7th Cir. 1998) (*Tinker*'s material disruption standard applies because the article ("So You Want To Be A Hacker") was distributed on-campus and advocated on-campus activity).

This is in part because extending the authority of school officials outside school premises and beyond school-sponsored activities would risk infringing upon the authority of parents. When students are not in school, they are under the jurisdiction of their parents. It is a long-established right to raise one's children without unnecessary governmental interference. *See Wisconsin v. Yoder*, 406 U.S. 205, 232

(1972); *see also Shanley*, 462 F.2d at 964 ("It should have come as a shock to the parents of five high school seniors . . . that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts.").

Moreover, extending school officials' authority over student speech when the students are off campus risks extending school officials' authority over students in other respects as well. First Amendment rights are not the only constitutional rights of citizens that are somewhat curtailed within the school campus. The requirement of Due Process is severely limited for student suspensions of ten days or less to what this Court has termed "rudimentary" due process. *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975). In a similar manner, the rights against unreasonable searches and seizures is modified on-campus, substituting the requirement of probable cause or a warrant with a requirement of a "reasonable suspicion." The Court justified this as a balance between the "legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

Expanding the schools' jurisdiction outside of its gates would make free speech, as well as these other rights, "a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker*, 393 U.S. at 513. Without the safeguard of the "schoolhouse gate," there would be no limit to the reach of school jurisdiction. This cannot and must not be the scope of the Bill of Rights – only to protect what schools have deemed appropriate.

II. EVEN UNDER THIS COURT'S STUDENT-SPEECH PRECEDENTS, SCHOOL OFFICIALS DO NOT HAVE DISCRETION TO CENSOR ANY SPEECH THEY DEEM CONTRARY TO THE SCHOOL'S EDUCATIONAL MISSION.

If the Court determines that this case should be analyzed pursuant to its *Tinker-Fraser-Kuhlmeier* trilogy of school speech precedents, it should reject the Petitioners' and the Government's novel, far-reaching attempt to extend these precedents to permit school officials to prohibit any student speech that they deem "undermines" or "is inconsistent with" a school's "basic educational mission" or the school's own message. Pet. Br. at 22, 25; United States Br. at 14, 17. The proposed broad reading would invert on their head the baseline principles of this Court's precedents, swallowing up the fundamental rule articulated by the Court that "school officials do not possess absolute authority over their students" and that "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

Necessarily, school officials are afforded broad discretion to promote particular messages through their own speech or through regulation of student speech in school-sponsored fora. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988) ("The question whether the First Amendment requires a school to tolerate particular student speech – the question we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."). Under our system of government, such broad latitude with regard to official speech or school-sponsored student speech is the means by which students are taught to become responsible

and active citizens – not through censorship of discordant, non-school-sponsored messages of individual students.

Petitioners claim that students' Constitutional rights of free speech exist only if there is "no valid educational purpose" in restricting their speech. Pet. Br. at 19, and 25. This is a dangerous inversion of this Court's holdings. Contrary to the Petitioners' proposed baseline principle of school authority over student expression, under this Court's established decisions, school officials have the authority to restrict otherwise protected student speech due to the special settings of schools *only* when such speech falls into one of three narrowly carved out exceptions: (1) when, in the context of mandatory school events, the manner of speech is lewd, vulgar, indecent, or offensive, *Fraser*, 478 U.S. at 685; (2) in the context of school-sponsored or curricular activities, when disfavored student speech might be construed as official school speech because it "bear[s] the imprimatur of the school," *Kuhlmeier*, 484 U.S. at 271;[5] or (3) when the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," *Tinker*, 393 U.S. at 513. Respondent's speech does not fall into any of these categories.

A. The Court Should Reject Petitioners' and the Government's Broad Proposed Reading of *Fraser*.

In urging reversal of the decision below, Petitioners argue that the Ninth Circuit "embraced an unduly narrow reading of this Court's teachings with respect to the free speech

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[5] As was stated in Part I of this brief, *supra*, the Olympic torch relay was a privately sponsored public event of state-wide importance, not a school-sponsored event, and could not be perceived as bearing the imprimatur of the school. Accordingly, official censorship pursuant to *Kuhlmeier* was not authorized.

rights of public school students," Pet. Br. at 14, and that "the banner's ambiguous but obtrusive message fell comfortably within the ambit of *Fraser*'s focus on promoting appropriate norms of discourse and civility." *Id.* at 15. With this argument, Petitioners rely on *Fraser* as a catch-all standard, authorizing the censorship of any student speech that school administrators find objectionable or contrary to their sense of the school's educational mission. The Government, too, argues that *Fraser* and *Kuhlmeier* confirm "that a school can prohibit speech inconsistent with its basic educational mission," Gov. Br. at 14, or that "counteract[s], if not drown[s] out, the schools' anti-drug message, especially because of peer pressure," *id.* at 17.

Such an expansive interpretation, however, distorts the holding in *Fraser* and provides a license for indiscriminate censorship of student speech. As is now familiar, the Court in *Fraser* addressed the discrete question of whether the school violated the First Amendment rights of a student punished for delivering a speech at a school assembly during classroom hours that presented a program on self-government (and that the Court compared to a classroom) based on "an elaborate, graphic, and explicit sexual metaphor" considered to be "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance." *Fraser*, 478 U.S. at 678-79.

Addressing the school's authority to penalize the speech at issue in *Fraser*, the Court held that it was "appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education," *id.* at 685-86. Thus the Court concluded that a "high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.* at 685.

While *Fraser* clearly recognized that students' speech rights are restricted in certain school contexts and that school officials may disassociate the school from the manner of student speech in certain official settings, *Fraser* was a limited holding pertaining to the manner of speech – specifically lewd, vulgar, indecent, and "plainly offensive" speech – in the context of an official school activity. *See, e.g., id.* at 683 ("The determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board." (emphasis added).) While it can hardly be disputed that school officials should not have to "surrender control" to students in a curricular activity, *Fraser* was not a broad license to censor any student speech occurring without school sponsorship that could be considered "offensive," or that the school deems inconsistent with the fundamental values of education, however it defines them.

Disregard of the limited and context-specific nature of the *Fraser* holding would create a classic slippery slope on which no student speech would be safe from the risk of administrative censorship, rendering the First Amendment protections articulated in *Tinker* all but a nullity, both on-campus and off. Reading *Fraser* to allow schools to prohibit any message or form of expression that the school determines to be offensive to its own principles essentially creates the scenario the *Tinker* majority eschewed—confining student expression to those sentiments that are officially approved. *See Tinker*, 393 U.S. at 511. Thus Petitioners' and the Government's proposed expansive reading of *Fraser* is unsupportable. *See Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting) (noting that a broad reading of *Fraser* "swallows up *Tinker*"), *petition for cert. filed*, 75 U.S.L.W. 3248 (U.S. Oct. 26, 2006) (No. 06-595); *Denno v. Sch. Bd. of Volusia County, Fla.*, 218 F.3d 1267, 1275 n.5 (11th Cir. 2000) (recognizing the strong arguments "that the

more flexible *Fraser* standard is limited to situations in which the speech is more likely to be perceived as bearing the imprimatur of the school.")

Rejecting such a broad reading of *Fraser*, the Second Circuit recently reversed the district court's ruling that would have barred a student from wearing a t-shirt that featured an image of President Bush along with images of drugs and alcohol to convey criticism of the President and his alleged past drug and alcohol use. *See Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), *petition for cert. filed*, No. 06-757 (Nov. 28, 2006). In so ruling, the Second Circuit explained:

> Dictionaries commonly define the word offensive as that which causes displeasure or resentment or is repugnant to accepted decency. We doubt the *Fraser* court's use of the term sweeps as broadly as this dictionary definition, and nothing in *Fraser* suggests that it does. But if it does, then the rule of *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency.

Id. at 327-28 (citation omitted).

A broad interpretation of *Fraser* would also effectively render the subsequent *Kuhlmeier* ruling superfluous, for there would have been no need for this Court to articulate the school's authority to censor school-sponsored student speech to advance a pedagogical concern if the school already had, under *Fraser*, boundless authority to regulate student speech it deemed to be inappropriate. This Court has never indicated that *Fraser* was meant to occupy the entire field of First Amendment law relating to students' speech rights in school, and has never cited *Fraser* in connection with the

notion that schools can punish "offensive" student speech that is not vulgar, obscene, or indecent. *See, e.g. Kuhlmeier,* 484 U.S. at 266-67 (citing *Fraser's* holding that schools need not tolerate "sexually explicit" speech that constituted "vulgarity," in the context of an official school assembly); *Denver Area Educ. Telecomms. v. FCC*, 518 U.S. 727, 775 n.2 (1996) (referring to *Fraser* as an "indecency" case); *see also Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214-16 (3d Cir. 2001) (Alito, J.) (striking down as unconstitutionally broad a school anti-harassment policy that did not confine itself to "vulgar or lewd speech," school-sponsored speech, and speech that would likely lead to substantial disruption or interference with the work of the school or the rights of other students). If student speech rights were governed entirely by *Fraser*'s "offensive speech" language, restraint of student speech would have little limit.

As the Ninth Circuit soundly noted in its opinion below, "[t]here has to be some limit to the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of *Tinker* that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (internal quotation omitted). Pet. App. 11a. This Court must be careful not to broaden deference to schools to make these kinds of decisions that clearly violate the First Amendment rights of students, if students are to have any rights at all.

B. Under *Tinker*, Frederick's Speech Is Protected.

Nor is it necessary to interpret *Fraser* broadly. The fear articulated by Justice Black's dissent in *Tinker* that the ruling would lead to "a new . . . era of permissiveness," *Tinker*, 393 U.S. at 518 (Black, J., dissenting), has not been historically supported. The *Tinker* standard accounts for the notion that student speech rights are not coterminous with those of

adults; students have free speech rights only up to the point at which their speech interferes with the educational process of the school, through a substantial and material disruption of school activities or violation of others' personal rights.

The limits on student speech under *Tinker* have proven not to be merely theoretical. Courts engaging in a straightforward application of *Tinker* have upheld school censorship where the speech at issue clearly threatened disruption of the educational process of the school. School discipline of student speech has commonly been affirmed under *Tinker* in the context of student displays of the Confederate flag in schools that have histories of racial conflict among the students. *See Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 489-90, 492-93 (D.S.C. 1997) (upholding school suspension of student wearing jacket bearing confederate flag, based on reasonable anticipation of disruption due to school's history of disorder resulting from display of the flag); *Melton v. Young*, 465 F.2d 1332, 1333-35 (6th Cir. 1972) (same); *see also West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1365-66 (10th Cir. 2000) (upholding prohibition of display of the Confederate flag based on past incidents at the school involving the flag); *cf. Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 538 (6th Cir. 2001) (reversing summary judgment in favor of school for punishment of student's display of Hank Williams, Jr. t-shirt picturing confederate flag, in part because the school did not demonstrate history of turmoil surrounding flag that would justify fear of disruption). Effective applications of the *Tinker* material disruption standard can be seen in a variety of other contexts as well.[6]

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[6] In *Heinkel v. School Board*, 194 F. App'x 604 (11th Cir. 2006), for example, the court struck down as facially unconstitutional a school board policy prohibiting all religious and political symbols as a *(cont'd)*

Although the *Tinker* standard is designed to allow schools the flexibility to discipline student speech that disrupts the educational process, it does not permit the censorship that occurred in this case. The record shows no indication that the school administrators anticipated any disruption due to Frederick's banner, or that Frederick was involved in any disruptive conduct. Although Petitioners make it appear as if Respondent had been throwing snowballs and beverage bottles, Pet. Br. at 4, "the uncontradicted evidence is that it had nothing to do with Frederick and his fellow sign-holders." Pet. App. 2a. The graffiti incidents cited, Pet. Br. at 6, even if resulting from Respondent's expression rather than from Petitioners' censorship, do not rise to the level of disruption that the Court in *Tinker* had envisioned. The armbands in *Tinker* "caused comments, warnings by other students" and that "a teacher of mathematics had his lesson period practically 'wrecked'." *Tinker*, 393 U.S. at 518 (Black, J., dissenting). However, such level of "disruption" was not sufficient, according to the majority in *Tinker*, which concluded that "[t]here is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work." *Id.* at 508. Such is the case here.

Moreover, Petitioners' claim that Frederick's banner "substantially interfered with a school-sanctioned activity,"

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content-based restriction unsupported by reasonable belief that all such expression would create substantial disruption in the schools. The court rejected, however, an as-applied challenge to the prohibition of distribution of abortion-related literature, where the factual record reflected a reasonable forecast of substantial disruption or material interference with school activities. *Id.* at 608-09. Similarly, in *Pinard v. Clatskanie School District*, 467 F.3d 755 (9th Cir. 2006), the court held under *Tinker* that students' petition and complaints against their basketball coach were protected speech, but refusal to board the bus and participate in a scheduled game was not protected because it substantially disrupted and materially interfered with the operation of the basketball program. *Id.* at 759.

Pet. Br. at 31, is a novel one that was not presented previously to the courts. Before the Ninth Circuit, Petitioners conceded that Frederick's speech was censored only because it conflicted with the school's "mission" of discouraging drug use, not because Principal Morse was reasonably concerned about the likelihood of substantial disruption to the school. Pet. App. 3a. The Petitioners' characterization of the banner in this Court as "an antisocial publicity stunt designed to draw attention away from an important (and historic) school activity" does nothing to establish a reasonable basis for censorship under *Tinker*. Pet. Br. at 25. Petitioners' justification, that the message was "directly contrary to the school's basic educational mission of promoting a healthy, drug-free lifestyle," demonstrates that the conflict between Frederick and the school is a purely ideological one. The record does not support a different justification, and *Tinker* clearly does not sanction school discipline in such a situation.

In a second attempt to show that the school's censorship was justified under *Tinker*, the Government attempts to distinguish *Tinker* on the ground that "[u]nlike respondent's banner, Tinker's armband protesting the Vietnam War did not advocate illegal conduct, and did not address a topic central to a school's basic educational mission." Gov. Br. at 7. Notwithstanding the fact that Respondent's message is an issue under dispute, Pet. App. 4a,[7] this distinction does not hold up to historical review.

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[7] The Respondent testified that his intent was to make a point about *freedom of speech*, rather than drugs. In his deposition testimony, for example, Frederick explained his banner as follows: "Q: And what was the message that you were trying to communicate to the national TV audience? A: That free speech is free speech. As long as you are not threatening someone or harassing someone, you can say what you want." J.A. 70-71. *See also* J.A. 29 ("We were not

(cont'd)

Not unlike the school board of Juneau, the school board in *Tinker* justified its response to the armbands based on the highly provocative nature of their expression, given that the Vietnam War was such an inflammatory issue, and that as such the armbands were likely to disrupt the school environment and its educational mission. *See* Brief for Respondent at 19-20, 21, *Tinker*, 393 U.S. 503. In 1968, the armband protest may well have been viewed as advocating illegal conduct (*e.g.*, draft-dodging, interference with military recruitment, or other types of civil disobedience), and the school board may well have defined its educational mission, in part, as the creation of loyal and patriotic citizens who would not openly protest war in a defiant manner. Certainly, support of the civil rights movement in the same historical period would likely have involved advocacy of illegal conduct (*e.g.*, sit-ins, marches without permits, "trespassing" at segregated lunch counters). Practically speaking, there are very few types of student speech against which a school board could not, with a little creativity, define as contrary to its "basic educational mission."

C. That Frederick's Speech May Have Advocated Illegal Drug Use Does Not Alter The First Amendment Analysis.

The result reached by the Ninth Circuit in this case is both correct according to the demands of the First Amendment and consistent with the demands of education policy. Petitioners belabor the point that schools have a role to play in preventing drug use by minors, citing the Safe and Drug-Free Schools and Communities Act, 20 U.S.C. §§ 7101 *et*

(cont'd from previous page)

> trying to deliver a religious message or any message related to drug use.... It was a parody, an attempt to be funny. We were not advocating anything. *We thought we had a free speech right to display a humorous saying, and that's all we were doing.*") (emphasis added).

seq. ("SDFSCA"). *See* Pet. Br. at 26-28. This is of course true, but it is immaterial. Nowhere does the SDFSCA require that schools prohibit or otherwise limit student speech having to do with drugs, and in fact, to the extent the statute implicates speech at all, its emphasis rests squarely on the promotion of speech and other forms of disseminating information on the subject. *See* 20 U.S.C. § 7115(b).

This case is about schools' reactions to students' speech. Shutting down student expression is not an effective response; under the First Amendment, it is not a permissible response. As Justice Brandeis wrote: "Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds sub nom. Bradenburg v. Ohio*, 395 U.S. 444 (1969).

Of course, teachers who hear or observe student speech or expression that they find inappropriate or offensive are not required to ignore the speech until it provokes some kind of significant disturbance in the school. In situations in which a student presents provocative expression, teachers can and should do what they are trained to do: make a lesson out of it. Practically speaking, a teacher may speak with the student and ask what the purpose of the message is, why the student feels compelled to share the message, and whether the student really thinks it is an appropriate message to put forth in the context of school; the school may even choose to lead a formal assembly on the issue.

It is a fundamental principle of First Amendment jurisprudence that the best antidote to objectionable speech is more speech, and this principle is no less salient in the

context of a public school. Indeed, the school setting is an especially fitting environment for exactly the kind of open discourse and debate that is meant to be fostered by the First Amendment. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That [school boards] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

CONCLUSION

The NCAC and ABFFE as *amici curiae* respectfully request that this Court affirm the decision of the court below which vacated and remanded the district court's grant of summary judgment in favor of school officials.

Respectfully submitted,

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No. 06-278

IN THE
SUPREME COURT OF THE UNITED STATES

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
Petitioners,

v.

JOSEPH FREDERICK,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association (NSBA) is a non-profit federation of state associations of school boards, representing the 95,000 school board members who govern nearly 15,000 local school districts across the United States. These local public school districts serve more than 46.5 million public students, or approximately 90 percent of the elementary and secondary students in the nation. The NSBA Council of School Attorneys is the national professional association for attorneys who represent school districts.

The American Association of School Administrators (AASA) is a professional organization of over 14,000 educational leaders across the United States and in other countries. AASA supports school district leaders who are dedicated to quality public education in their communities.

The National Association of Secondary School Principals (NASSP) is the preeminent organization and the national voice for middle level and high school principals, assistant principals and aspiring school leaders. NASSP provides its members with the professional resources to serve as visionary leaders. NASSP promotes the intellectual growth, academic achievement, character development, leadership development, and physical well being of youth through its programs and student leadership services.

Amici share a commitment to supporting and encouraging school boards and hundreds of thousands of local administrators in their efforts to promote safe and effective learning environments that consistently reinforce the academic lessons and civic values it is their duty to impart. *Amici* strongly believe that local school boards and

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[1] This brief is submitted with the consent of all parties. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

administrators, and not federal courts, are generally best situated to make and enforce reasonable and appropriate policy decisions for their schools in fulfilling this duty. At a time when schools are experiencing fiscal difficulties and challenges, a clear elucidation of how schools can regulate student speech under these principles will shift the focus away from litigation and more toward education.

SUMMARY OF ARGUMENT

Each day school administrators like Principal Morse must manage the conflict between maintaining a safe and effective learning environment for all students, and dealing sensitively and lawfully with student free speech issues. The conflict can arise in many ways, ranging from the expression of religious views,[2] to racially offensive statements,[3] to violent or provocative messages,[4] to promoting activities that are illegal or inappropriate for children.[5]

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[2] *E.g., Harper v. Poway Unified Sch. Dist.* 445 F.3d 1166 (9th Cir. 2006), *pet. for cert. filed*, 75 USLW 3248 (Oct. 26, 2006) (No. 06-595) (student T-shirt expressing religious objection to homosexuality); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) (student mural with religious images); *Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (student distribution of holiday gift with religious message); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) (salutatorian speech with proselytizing comments).

[3] *E.g., Scott v. School Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003) (display of Confederate flag); *West v. Derby Unified Sch. Dist. No.260*, 206 F.3d 1358 (10th Cir. 2000) (same).

[4] *E.g., Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996) (student threats of violence against school counselor); *Governor Wentworth Regional Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410 (D.N.H. 2006) (student wearing "tolerance patch" in school polarized by pro- and anti-gay factions).

[5] *E.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (student T-shirt promoting anti-social, destructive and inappropriate behavior); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999) (band performance of song promoting illegal drug use).

This Court should fine tune the balance struck in its existing jurisprudence on this subject between the competing interests of student free speech and the need for orderly and effective "on-task" schools, by providing further guidance on the authority of public school officials to regulate student expressive activity when, in their reasonable professional judgment, it impinges on the learning environment. *Amici* urge the Court to clarify the standards as follows.

First, within the analytical framework of the *Tinker-Fraser-Hazelwood*[6] trilogy, the Court should confirm that *Fraser* is not limited solely to sexual speech or sexual innuendo, but also encompasses pro-drug and other messages inimical to a school's core educational mission and ability to instill fundamental civic values and appropriate behavior. Local school boards are best suited to establish policies limiting "plainly offensive" speech, inculcating values, and regulating expression and behavior that in the reasonable professional judgment of school officials is inconsistent with their core educational mission. School boards should be able to consistently promote and enforce that educational mission in all school-authorized and school-supervised settings, both on and off campus, since the 21st century teaching environment is not, and should not be, confined to books or to the four walls of a classroom.

Second, this Court should reaffirm that *Tinker* establishes a two-prong analysis, allowing schools to regulate speech causing a substantial disruption *or* intruding on the rights of other students. This will allow school boards and administrators to foster education-focused environments where students can learn free from messages that are threatening or hurtful to them or otherwise at odds with the academic and citizenship-building work of the schools.

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[6] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

Third, this Court should clarify that the less a phrase like "Bong Hits 4 Jesus" conveys a particular message and the closer it approaches self-serving nonsense, the more leeway school officials have in regulating such expression, and the more deference their reasonable judgments in such matters should receive. Given the continuum of student speech arising from this Court's precedents, beginning with political "messages" and continuing through nonsensical statements,[7] low value speech approaching the nonsensical, such as Frederick's use of the phrase "Bong Hits 4 Jesus," should receive little or no First Amendment protection.

Finally, this Court should affirm that school administrators endeavoring to enforce school district policies governing the regulation of speech should be entitled to qualified immunity because student free speech jurisprudence has remained "unsettled water ... rife with rocky shoals and uncertain currents." *Guiles v. Marineau*, 461 F.3d 320, 321 (2d Cir. 2006). If allowed to stand, the Ninth Circuit's denial of qualified immunity may operate as a disincentive for administrators to effectively implement discipline for fear of personal liability, as a disincentive to serve as a school administrator, and as a disincentive for schools to broaden the venues for educational and learning opportunities beyond the four walls of the classroom.

ARGUMENT

I. Schools Must Be Able To Maintain Safe And Effective Learning Environments To Carry Out Their Educational Mission

School administrators are professional educators charged by their states and communities with day-to-day

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[7] *See Fraser*, 478 U.S. at 680, 685 (distinguishing student's vulgar statements from political message at issue in *Tinker*.)

responsibility for educating the nation's children. This Court has described education as "perhaps the most important function of state and local governments...the very foundation of good citizenship, ... [and] a principle instrument in awakening the child to cultural values...." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (quoted in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 272).

To prepare students for work and citizenship, school administrators must carry out school board policies adopted to promote safe, orderly, and effective operation of our schools.[8] Based on longitudinal studies, for schools to accomplish their core educational mission, they must use not only the "best teaching technology to improve academic competence," but also "reduce the barriers to learning," such as "delinquency and drug use." Richard F. Catalano et al., *The Importance of Bonding to School for Healthy Development: Findings from the Social Development Research Group*, 74 J. Sch. Health 7, at 260 (Sept. 2004) (concluding that focusing solely on academic achievement is likely to leave children behind). This nexus is unsurprising, and schools' aim to reduce the use of drugs by students and the promotion of drug use in their student population makes sense in light of documented drug use by students in public education.[9] By developing and maintaining safe learning

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[8] As Justice Breyer noted in his concurring opinion in *Board of Educ. v. Earls*, 536 U.S. 822, 840 (2002) (citation omitted): "Today's public expects its schools not simply to teach the fundamentals, but 'to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services,' all in a school environment that is safe and encourages learning."

[9] *See, e.g.*, National Center on Addiction and Substance Abuse at Columbia University, National Survey of American Attitudes on Substance Abuse XI: Teens and Parents (Aug. 2006) at 13-16 (7 out of every 10 seventeen-year olds (69%) have been offered marijuana in their lifetimes); Rodney Skager and Gregory Austin, Highlights, 11th Biennial California Student Survey Drug, Alcohol and Tobacco Use 2005-2006

environments, schools increase academic success and reduce health-compromising behaviors by students, including illegal drug use and violence. Robert Blum & Heather P. Libbey, *Executive Summary,* 74 J. Sch. Health 7 (Sept. 2004) (evidence supporting the relationship between "school connectedness" and lower incidence of emotional distress, violence, suicide attempts, and drug use in students).[10]

In addition to social science research on "school connectedness," which establishes the link between student success and student physical and mental wellbeing, there are state and federal laws recognizing the importance of supporting the physical and mental wellbeing of students and supportive learning environments. For example, the federal Safe and Drug Free Schools Act, 20 U.S.C. § 7101 *et seq.,* requires that school districts receiving funds under this law certify that their drug prevention programs "convey a clear and consistent message that ... illegal use of drugs is wrong and harmful." *Id.* at § 7114(d)(6).[11] To create safe and drug-

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(California Attorney General's Office Fall 2006) at 7-9 (finding nearly half of 11th grade students have used drugs).

[10] This theoretical and empirical focus on what has variously been labeled "school bonding," "school climate," "school engagement," or "school connectedness" relates to students' beliefs that teachers and administrators care about student learning and care about students as individuals. The studies emphasize the role of school connectedness in reducing health-compromising behaviors and increasing academic success. The studies indicate that students with high levels of school connectedness "report lower levels of emotional distress, violence, suicide attempts, and drug use." *Executive Summary*, 74 J. Sch. Health 7 at 231 (Sept. 2004). One of the critical components for increasing connectedness is students' experiencing both physical and emotional safety at school. *Wingspread Declaration on School Connections*, 74 J. Sch. Health 7 at 233 (citations omitted).

[11] State education departments have also established grants and other measures to promote safe and supportive learning environments. *See, e.g.*, Massachusetts Department of Education, Safe and Supportive Learning Environments, Competitive Grant Fund, http://finance1.doe.mass.edu/grants grants07/rfp/791B.html; Office of Superintendent of

free schools, the vast majority of school districts across the nation, like the Juneau School District, have adopted anti-drug policies ranging from drug education programs, bans on pro-drug messages on student apparel, drug testing of students, and mandatory discipline of students found in possession of or selling drugs on school grounds.[12] Also of relevance to schools efforts to create safe learning environments through regulation of student speech are state and federal laws mandating school districts to prohibit harassment directed at students. Failure to protect students from harassment can subject school districts to statutory and common law (tort) actions, as well as to suit for violation of federal constitutional rights redressable via 42 U.S.C. § 1983, and for violation of federal laws such as Title VI and Title IX.

II. School Districts May Lawfully Regulate Student Speech That Undermines Their Core Educational Mission Or Interferes With Maintaining A Safe And Effective Learning Environment

In deciding this case, *Amici* urge this Court to clarify that school districts may lawfully regulate student speech that undermines their core educational mission or interferes with maintaining a safe and effective learning environment. *Amici* believe that this proposition is supported by this Court's student free speech precedents and its acknowledgement that the daily operation of schools should largely be left to the reasonable professional judgment of local school officials.

In constructing the *Tinker-Fraser-Hazelwood* analytical scaffolding as the means to evaluate the

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Public Instruction, Washington, Supportive Learning Environment, http://www.k12.wa.us/SchoolImprovement /Environment.aspx.

[12] Pet. for Writ of Cert. at 17-21.

continuum of student free speech issues arising in the school context, this Court has steadfastly recognized that to fulfill their educational mission, schools must be able to maintain the safe and orderly environments necessary for effective learning to take place. So while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," student free speech rights are not co-extensive with the rights of adults in other settings *Tinker*, 393 U.S. at 506; *Fraser*, 478 U.S. at 682. Instead, the First Amendment "must be applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266 (internal citation and quotation marks omitted). The Court has repeatedly cautioned that the constitutional balance must be struck in a way which does not impair schools' ability to perform their core educational mission which includes instilling fundamental civic values. Schools do not need to "surrender control of the American public school system to public school students.'" *Id.*, at 272, n.4, quoting *Fraser* 478 U.S., at 686 (quoting Justice Black's dissent in *Tinker*, 393 U.S. at 526).

Applying these precedents, the lower federal courts have often lost sight of these fundamental underlying principles in developing a synthesis that uses *Tinker* in considering all student speech that is not (1) vulgar, lewd, indecent, or profane under *Fraser*, or (2) school-sponsored and subject to *Hazelwood*. As the Second Circuit Court of Appeals recently observed after reiterating this synthesis,

> Our articulation of the *Tinker-Fraser-Hazelwood* trilogy is in accord with how other circuits commonly understand these cases. *See, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F. 3d 200, 214 (3d Cir. 2001) (Alito, J.) ("To summarize: Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under

> *Hazelwood*, a school may regulate school-sponsored speech... Speech falling outside of these categories is subject to *Tinker's* general rule..."); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) ("We conclude...that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*.")

Guiles v. Marineau, 461 F. 3d 320, 325-26 (2d Cir. 2006), *petition for cert. filed*, 2006 WL 3462961 (U.S. Nov. 28, 2006) (No.06-757). Yet, as the *Guiles* court admitted, it is not entirely clear that *Tinker* encompasses all student speech not sponsored by schools, subject to *Fraser*,[13] just as it is not certain what type and quantum of "substantial disruption" or "material interference with" school activities will remove a student's expressive activity from the scope of *Tinker* protection:

> Proceeding according to the understanding that *Tinker* applies to all non-school-sponsored student speech that is not lewd or otherwise vulgar, we note that if the "material and substantial interference" test is meant to describe vocal protest and disputes

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[13] Indeed, this Court's elucidation—and limitation—of *Tinker* in *Fraser* came about as the result of the Ninth Circuit Court of Appeals' determination, based upon an overly broad reading of *Tinker*, that school officials could not penalize a student's lewd campaign oration at the school assembly. 478 U.S. at 680 (citation omitted) ("[I]n *Tinker*, this Court was careful to note that the case did 'not concern speech or action that intrudes upon the work of the schools or the rights of other students.'").

> of similar character and magnitude, schools must tolerate a great deal of speech that is not lewd or vulgar.

Id. at 326. Nonetheless, the Ninth Circuit appears to have proceeded on precisely that theory in this case, without considering how requiring schools to tolerate student speech at odds with core school values erodes a school district's ability to fulfill its mission. Recognition of that mission was at the heart of the course correction the Court effected in *Fraser*, to which we now turn.

A. Under *Fraser* Schools Can Regulate Messages Inimical To Fundamental School And Civic Mores, Such As Messages That Tout Or Trivialize Illegal Use Of Drugs In All School Authorized Settings

The *Fraser* Court prefaced its First Amendment analysis by pointing out—not for the first time—the centrality of public education to this country's particular form of social contract. *Fraser*, 478 U.S. at 681 (in preparing student for citizenship in the Republic, public education also "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practices of self-government in the community and the nation.") (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)).

Although this Court said inculcation of fundamental values must include tolerance of even unpopular political and religious views, it emphasized that this imperative should not outweigh the educational goals of schools in ensuring that students gain knowledge and skills critical to their development into healthy and productive citizens:

> The undoubted freedom to advocate unpopular and controversial views in

> schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Id.

Despite *Fraser*'s language focusing on the schools' ability to regulate student speech in a manner consistent with carrying out their educational mission, school districts, like Juneau-Douglas High School in this case, haled into court to defend their regulation of student speech often encounter courts that interpret *Fraser* too narrowly, with little focus on the schools' mission to inculcate values or teach socially appropriate behavior, but instead limiting *Fraser* to sexually explicit speech. The Ninth Circuit did so in the case at bar, restricting *Fraser* to cases involving sexual speech that may result in campus disorder among those "new to adult hormones." *Frederick,* 439 F.3d at 1119. Under such an interpretation, student speech must be "'plainly offensive' in the way sexual innuendo is," before it can be proscribed under *Fraser,* and a phrase about Jesus and drug use does not rise to that level. *Id.*. The Second Circuit has likewise wrongly confined *Fraser's* reach to student speech that is "lewd," "vulgar," "indecent," or "plainly offensive," meaning speech that "connote[s] sexual innuendo or profanity." *Guiles,* 461 F.3d. at 327.

These decisions ignore the fundamental principle underlying this Court's decision in *Fraser.* In acknowledging the profound role of schools in teaching "socially appropriate behavior" and "inculcating values," *Fraser* did not limit them to regulating only sexual speech. Rather, this Court declared a school district need not tolerate speech that is "inconsistent with its basic educational mission." 478 U.S. at 685.

Applying *Fraser* straightforwardly, other courts have cut a wider swath that properly allows schools to regulate speech that advocates, among other things, anti-social behavior, alcohol and drug use as antithetical to their educational mission. *E.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (upholding district's ban on Marilyn Manson T-shirts in light of school's dress code prohibiting clothing with offensive illustrations, or drug, alcohol, or tobacco slogans; and crediting school's contention that T-shirts interfered with school's basic educational mission by promoting anti-social and destructive conduct and demoralizing values, and by mocking a religious figure); *Nixon v. Northern Local Sch. Dist.*, 383 F.Supp.2d 965, 971 (S.D. Ohio 2005) (speech promoting suicide, drugs, alcohol, or murder can be regulated under *Fraser*); *Barber v. Dearborn Pub. Sch.*, 286 F.Supp.2d 847, 859 (E.D. Mich. 2003) (school officials may curtail speech related to alcohol or drugs); *Broussard v. Sch. Bd.*, 801 F.Supp. 1526, 1536 (E.D. Va. 1992) (speech "need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent or offensive is subject to limitation"); *Gano v. Sch. Dist. No. 411*, 674 F. Supp 796, 798-99 (D. Idaho 1987) (T-shirt with caricature of three school administrators holding liquor and appearing drunk on school property was "clearly offensive"). These decisions recognized that absent political speech, schools may constitutionally regulate student messages promoting or trivializing drug use.[14]

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[14] Application of First Amendment jurisprudence in the promotion of safe, drug-free schools is consistent with this Court's Fourth Amendment jurisprudence allowing schools to curtail student drug use. In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995), this Court recognized the schools' compelling interest in reducing student drug use. "That the nature of the concern is important—indeed perhaps compelling—can hardly be doubted ... School years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* With these concerns in mind, under the Fourth Amendment balancing test, and the legal and practical principle that schools have "custodial and tutelary"

By essentially equating a school's educational mission solely with classroom teaching, the Ninth Circuit also erroneously dismissed *Fraser*'s admonitions regarding schools' broad responsibility and its legal implications. 478 U.S. at 683 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.")

Nonetheless, the Ninth Circuit confined the school district's educational mission to the narrowest precincts possible, calling the students' attendance at the Olympic Torch relay "a non-curricular activity that was only partially supervised by school officials" where presumably any student speech would be permissible because it would not interfere with the school's basic educational mission. *Frederick*, 439 F.3d at 1123.

In reality, today's teaching environment necessarily extends well beyond classroom walls to co-curricular and extra-curricular activities occurring in many settings, including cyberspace.[15] Yet under the Ninth Circuit's rationale, a school district may not carry forth its educational mission consistently across settings—the football game, the

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responsibility over students and "the duty to 'inculcate the habits and manners of civility'" (*id.* at 655-56 (citations omitted)), this Court upheld the school district's use of random drug testing of student athletes. *Id.* at 653. In *Board of Education v. Earls*, 536 U.S. 822 (2002), this Court noted that drug use by students had increased since its decision in *Acton*, and that "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Id.* at 834. In the end, the Court upheld the school district's random drug testing policy for students participating in extracurricular activities. *Id.* at 837.

[15] The Ninth Circuit's ruling also affects the ability of schools to be innovative and stay abreast of ever-advancing technology, such as e-learning and distance learning, by narrowly restricting settings in which schools can regulate speech.

field trip, the classroom, the school supervised activity—all situations where students remain under the custodial care and tutelage of the school.[16]

The Ninth Circuit's ruling unworkably limits district control over student speech and behavior in a manner inconsistent with the weight of authority manifest in student discipline cases. *See, e.g., Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (student disciplined for off-campus creation of graphic and violent sketch depicting armed siege of school, later brought to school); *Layshock v. Hermitage Sch. Dist.*, 412 F.Supp.2d 502 (W.D. Pa. 2006) (student disciplined for creating on an off-campus computer an online parody profile of his building principal); *Collins v. Prince William County Sch. Bd.*, 142 Fed.Appx. 144 (4th Cir. 2005) (unpublished) (student expelled under district policy allowing discipline of students for off-campus offenses). Schools should be entitled to regulate speech inconsistent with their educational mission and to maintain orderly, distraction-free teaching environments in all settings where students are entrusted to their care and tutelage.

If allowed to stand, the Ninth Circuit's ruling would severely hamper the ability of school officials to maintain

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[16] Neither the federal district court nor the Ninth Circuit Court of Appeals deemed *Hazelwood* to be pertinent to Juneau school officials' right to control plaintiff Frederick's unfurled banner as an affront to the district's public position against use of illegal substances. But where students are across the street from their school, attending a school sponsored event, holding a pro-drug banner, witnesses of the event and TV viewers predictably may attribute the message--or at least school officials' nonchalance regarding the message—to Juneau-Douglas High School. In such a circumstance, a court could apply the *Hazelwood* rubric and grant greater latitude to the school in regulating the speech, which onlookers reasonably might perceive as bearing the imprimatur of the school. To the extent—and the record shows it was considerable—that school officials intended the students' witnessing of the Olympic Torch Relay to be an educational and historic experience, *Hazelwood* also would affirm their prerogative to act so as to ensure that the lesson intended was the lesson learned.

safe and effective learning environments and to accomplish their core educational mission except in the classroom or during strictly defined curricular activities. The Ninth Circuit's decision may cause schools to forego outside opportunities available in their communities or other locales because their ability to discipline students is severely constrained. This ultimately results in detriment to the students, who would lose out on a broad array of learning opportunities outside the classroom.[17]

B. Local School Boards Need Reasonable Latitude To Define Their Educational Mission, And School Officials Should Be Afforded Reasonable Professional Discretion To Determine When Speech Is Inconsistent With That Mission Or Interferes With Maintaining A Safe And Effective Learning Environment

The determination of whether student speech is at odds with schools' educational mission should be vested in school boards, which establish policies based on local community standards, and who are intimately familiar with the "facts on the ground" that may make an expression perceived as innocuous or unremarkable in one school community, so inflammatory and divisive in another one that it interferes with the educational process. As this Court has acknowledged, the "determination of what manner of speech

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[17] This case presents a good example of an outside learning opportunity—how often do students have the opportunity to view an Olympic Torch Relay? Would the Juneau School District have allowed its students to attend the torch relay during school time if it knew it lawfully could not maintain order among its students? We believe the answer is no. Thus, courts should not establish legal obstacles that impair a school's ability to provide diverse learning opportunities that help them achieve the district's educational goals.

in the classroom or in a school assembly is inappropriate properly rests with the school board." *Fraser*, 478 U.S. at 683. Courts routinely defer to local school district definitions of their educational mission and priorities, and grant particular deference to school administrators in regulating speech inconsistent with that mission. *E.g.*, *Poling v. Murphy*, 872 F.2d 757, 761 (6th Cir. 1989) (deferring to decision of local elected school board the question of whether student discipline imposed for derogatory comments was appropriate); *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F.Supp.2d 550, 563 (N.D. Tex. 2004) (school district properly regulated speech inconsistent with school district's "abstinence-only" educational curriculum); *Broussard*, 801 F.Supp. at 1536 ("The federal courts, ill-suited as they are to second guess decisions of school authorities, should interfere only in the most stringent circumstances") (citations omitted).

As with the field of obscenity,[18] student speech that might not be plainly offensive to the educational mission in one community may in fact be plainly offensive speech in another community. *Sable Communications of Calif. v. Federal Communications Comm'n*, 492 U.S. 115, 125-26

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[18] In the field of First Amendment obscenity jurisprudence, the test for whether the regulated purported speech is obscene is: "(a) whether 'the average person, *applying contemporary community standards*' would find that the work, taken as a whole, appeals to the prurient interest....; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added). The Court justifies such a framework, in part, based on the futility of applying a nationwide, as opposed to community standard, and instructs that it is "neither realistic nor constitutionally sound to read the First Amendment ..." to require the people of one state be bound by the standard of another state, where the "tastes and attitudes ..." may differ between the two. *Id.* at 33; *cf. Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

(1989). Since school officials handle day-to-day operations of their schools, and school board members are typically members of the local community, they are best situated to apply evolving community standards in their schools and to determine whether a student's speech is counter to or "plainly offensive" to their educational mission.[19]

This approach to First Amendment jurisprudence is consistent with this Court's longstanding recognition of the critical need for local control of public education. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process...." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *see Dayton Board of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("local autonomy of school districts is a vital national tradition") (citations omitted). The tradition of local control in public education "affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for education excellence.'" *Milliken*, 418 U.S. at 741-42, quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

Consistent with this proposition, "[t]he Court has long recognized that local school boards have broad discretion in the management of school affairs." *Board of Educ. v. Pico*, 457 U.S. 853, 863-64 (1982) (plurality

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[19] Interestingly, it has been noted that even if applying varying values and standards and the multitude of local school communities, "it is likely that many of the substantive values taught would be identical, including patriotism, racial and gender equality, and opposition to drugs and tobacco use." Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 Cornell L. Rev. 62, 87 (2002).

opinion) (citing *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)). The Court's recognition in *Hazelwood* of the need to balance free speech concerns with educators' responsibility for children was "consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." 484 U.S. at 273 (citations omitted). "Local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and [ ] 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.... Of course, courts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless *'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts.*" *Pico*, 457 U.S. at 864, 867 (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968) (emphasis added).

Under these principles and sensible traditions, school boards and school administrators are in the best position to determine whether student speech interferes with the particular school's educational mission. In no way does this mean that school officials have unbridled discretion to define and promote their educational mission in a manner that capriciously tramples on students' First Amendment rights. Indeed, local school officials experienced at establishing their schools' educational mission through adoption and implementation of district policies are trained to take many factors into consideration in developing school policies.[20] A

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[20] For example, *Amicus* NSBA provides technical policy-making assistance to local community school boards, including a policy database, legislative updates, and guidance on federal law. *See* http://www.nsba.org. Further, over 45 state school board associations offer model policy services to assist local school boards in the development of research-based and legally supported policies.

school's educational mission as defined through its policies is constrained, and sometimes mandated, by voluminous and expanding legal rules and regulations; informed by scientific research, educational expertise, and community input; and ultimately subject to the censure of the ballot box. The resulting policies establish the controls that make the management of schools possible, also making school boards accountable to their local communities. *See generally* Frederick M. Hess, *School Boards at the Dawn of the 21st Century* (2002), http://www.nsba.org/site/docs/1200/1143.pdf (presenting data on both input from community on policy issues and mechanism for school board elections).

Thus, the Ninth Circuit's suggestion that school officials somehow might arbitrarily define their educational mission in a manner that would allow them to deprive students of free speech rights could not be further from reality. Certainly this Court in both *Fraser* and *Hazelwood* had little difficulty rejecting precisely this same concern. *Fraser,* 478 U.S. at 680 (noting Ninth Circuit's concern that granting school district "unbridled discretion" to determine what discourse is decent would "increase the risk of cementing white, middle-class standards"); *Hazelwood,* 484 U.S. at 280 (Brennan, J. dissenting) ("If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor students in each of... [several] hypotheticals, converting our public schools into 'enclaves of totalitarianism.'") (citing *Tinker*). Most recently, rather than either subjecting the principal's actions in *Hazelwood* to an excessively narrow *Tinker* standard or simply giving school officials *carte blanche*, this Court recognized the professional discretion that school officials must have and determined that each of the principal's disputed decisions was reasonable under the circumstances. *Id.* at 274-76. The nation's democratically governed schools hardly have descended into despotism as a result.

C. Allowing Schools To Regulate Student Speech That Undermines Their Educational Mission Or Interferes With Maintaining A Safe And Effective Learning Environment Is Supported By *Tinker's* Two-Part Standard

This Court's decision in *Tinker* established that school authorities may constitutionally regulate "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder *or* invasion of the rights of others." *Tinker*, 393 U.S. at 513 (emphasis added). By using the word "or", this Court conveyed that *Tinker* permits school regulation of student speech in either of two scenarios. In the first, a public school can regulate student speech when it results in "substantial disruption of or material interference with school activities," or can reasonably be forecast to do so. *Tinker*, 393 U.S. at 514. In the second, a school can proscribe student speech that collides with the rights of other students to be "secure and to be let alone" or that would "impinge upon the rights of other students" without a showing of substantial disruption. *Id.* at 508, 509; *see also* Hazelwood, 484 at 273 n. 5 (determining that analysis of case under second prong of *Tinker* was unnecessary). In the second scenario, school officials need not show actual or potential disruption before they can regulate the student speech in question.

Despite *Tinker's* delineation of two separate and distinct circumstances justifying regulation of student speech, the Ninth Circuit decision conflated the two prongs of *Tinker* and focused exclusively on the asserted lack of substantial disruption. In *Frederick*, the court did not determine whether the student's banner interfered with the rights of others to be let alone and free from insulting or

derogatory remarks disrespectful of their religion. The phrase "Bong Hits 4 Jesus" might plausibly be interpreted as mocking Christianity's central religious figure and trivializing faith traditions or sincerely held religious beliefs in general. Although the school district in this case did not seek to justify its action against Frederick on the basis that his speech interfered with the religious rights of others, evidence in the record suggests that Frederick himself recognized that his banner might be offensive to devout Christian students. Despite this basis for invoking the second prong of *Tinker*, the Ninth Circuit instead incorrectly truncated *Tinker*'s holding into one prong and focused only on evidence of disruption.

Judicial disregard of the second part of the *Tinker* test has chilling and harmful consequences for schools and students. School officials accustomed to the sting and cost of summons and complaint may well hesitate to step in and regulate a student speaker's hurtful "opinion" message, which might conceivably implicate First Amendment interests, if they believe that the Constitution permits them to intervene only if they can prove actual or likely disruption (to the after-the-fact satisfaction of a federal judge). Yet hurtful messages by students feeling their free speech oats at the expense of others, even if the others suffer those messages in silence, can be toxic to a school's learning environment. *E.g., Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004) (finding that failure of school district's efforts to protect student from peer harassment constituted denial of free appropriate education for purposes of Individuals with Disabilities Education Act).

Other federal appellate decisions have properly treated interference with the rights of others as a separate and independent justification under *Tinker* for regulating student expressive activity. *E.g., Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (upholding school intervention against derogatory and injurious expression

directed at student's minority status such as race, religion, and sexual orientation without showing of disruption and interpreting *Tinker* to encompass student's right to be secure not merely "from physical assaults but also from "psychological attacks that cause young people to question their self-worth and their rightful place in society); *accord West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358, 1366 (10th Cir. 2000) ("display of the Confederate flag might ...interfere with the rights of other students to be secure and let alone"). *Harper* vividly illustrates the delicate balancing in which school officials engage, as the free speech dispute arose in a context that included a sizable recent jury verdict against the school district for failing to protect two former students from severe peer harassment based on sexual orientation. 445 F.3d at 1172 n.6.

This Court should take the opportunity presented by its review of *Frederick v. Morse* to underscore that the second part of the *Tinker* test stands independent of the first, and enables school officials to prohibit student speech that by its nature interferes with the rights of others in the school community without a showing of substantial disruption. To hold that schools can regulate student speech that undermines their basic educational mission—reasonably defined to include teaching against illegal use of drugs and palpably hurtful expressions of disrespect for others—comes nowhere near undoing *Tinker*. Students will continue to have a wide berth to be able to engage in political speech, protest school policies, and express personal viewpoints.[21] When student speech implicates First Amendment rights, school districts still will have, as they do now, the burden of showing that their regulation of the speech is allowed by this Court's precedents.

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[21] The court in *Frederick* stated, "Under *Tinker*, a school cannot censor or punish students speech merely because the students advocate a position contrary to government policy." *Frederick*, 439 F.3d at 1118. We agree.

D. Low Value Speech Is Not Worthy Of First Amendment Protection, And The Lower Value Of The Speech, The More Discretion School Officials Must Be Afforded

The primary concern of the free speech guarantee is "that there be full opportunity for expression in all of its varied forms to *convey a desired message*." *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976) (citations omitted) (emphasis added). The First Amendment protects conduct, symbols, and non-verbal speech that attempts to express an idea or convey a message that will likely be understood by the viewer. *Clark v. Community for Creative Non-Violence* 468 U.S. 288, 296 (1984). Alleged expressive activity that lacks this communicative element falls outside the purview of First Amendment protection. *See Blau v. Fort Thomas Public Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) (dress code policy could not be challenged on First Amendment theory amounting to "nothing more than a generalized and vague desire to express...middle-school individuality); *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp 556, 560-61 (D.N.M. 1995) (dress code on sagging pants failed because court could not discern any "particularized message" that would be apparent to viewers, and "[n]ot every defiant act by a high school student is constitutionally protected speech"); *Olesen v. Board of Educ. of Sch. Dist No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987) (male student's desire to wear an earring for asserted purpose of expressing his individuality, was not a "message" and was therefore subject to regulation by school authorities.)

When speech approaches the nonsensical, it receives little or no First Amendment protection, precisely because no intelligible message is being conveyed and it has little or no value in the school setting. To the extent the student's display of jabberwocky in this case may have been aimed at

drawing attention to himself by means of an eye-catching but inscrutable juxtaposition of drug slang with the word "Jesus," the First Amendment would not oblige Juneau school officials to indulge him. Such an ambiguous and low value "message" does not necessarily need or merit First Amendment protection. *See Salehpour v. University of Tennessee*, 159 F.3d 199, 208 (6th Cir. 1998) *cert. denied*, 526 U.S. 1115 (1999) ("Where the expression appears to have no intellectual content or even discernable purpose, and amounts to nothing more than expression of a personal proclivity designed to disrupt the educational process, such expression is not protected and does violence to the spirit and purpose of the First Amendment.").

Here, Frederick sought to grab attention at the Olympic Torch Relay by unfurling a banner containing words he admitted to be "just nonsense" and "designed to be meaningless and funny, in order to get on television." *Frederick*, 439 F.3d at 1116. Instead of treating the banner as an admitted publicity stunt, the Ninth Circuit infused the nonsensical words with a "degree of political salience," manufacturing a political connection to the legalization of marijuana never intended by the student and not one that could reasonably be perceived by a school administrator or the public as political speech.

Taking Frederick's own description of his message as "nonsense" at face value in no way diminishes the reasonableness of Principal Morse's view that the banner displayed a pro-drug message and thus was contrary to school district policy. Courts customarily defer to the judgment of school administrators in assessing the meaning and effect of student speech. *See Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) ("In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion."). Where a speaker does not intend to convey a specific message, the fact that some hearers attribute (rightly

or wrongly) a meaning to the message does not endow the expression with First Amendment protection. But also there was evidence that Frederick knew that bong hits referred to smoking marijuana, although he asserted he used the words playfully, not to advocate drug use. The more Frederick's characterization of his message is credited, the more latitude Principal Morse must be afforded in her response to it. Whether the banner was just nonsense or was a pro-drug message, her action in regulating Frederick's "speech" was constitutionally acceptable.

III. The Ninth Circuit's Startling Departure From Qualified Immunity Principles Must Be Corrected To Avoid Loss Of Educational Opportunities Outside Classrooms And Loss Of Effective School Leadership Due To Fear Of Personal Liability

Qualified immunity safeguards "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The immunity inquiry acknowledges "reasonable mistakes can be made as to the legal constraints on particular [official] conduct," including mistakes of fact and mistakes of law. *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

Qualified immunity also demands that the law be clearly established before its protections may be removed. *Saucier*, 533 U.S. at 202. A court must be satisfied that the right was so clearly established "that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, as the Ninth Circuit has construed this Court's rulings, the "*specific* contours of the law" must be well developed or sufficiently clear. *Rudebusch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002).

Student free speech jurisprudence is anything but

clear, with courts diverging widely in their application of this Court's precedents. *Compare Boroff* , 220 F.3d 465, 471 (upholding ban on T-shirts under *Fraser* based on the reasonable view that they promoted anti-social and destructive behavior, demoralizing values and disrespect of religious views of other students, all contrary to school's educational mission) and *Guiles,* 461 F.3d 328 (holding that *Fraser* applies solely to "speech containing sexual innuendo and profanity"). It is commonplace to read opinions in this genre in which courts remark on the "lack of clarity" in the Supreme Court's student speech cases, *id.* at 326, or that "[m]any aspects of the law with respect to students' speech...are difficult to understand and apply." *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) *(en banc), cert. denied*, _U.S._, 126 S. Ct. 1330 (Feb. 21, 2006) (No. 05-377), also granting qualified immunity to defendant administrators in that case, in as much as "public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved." *Id.*

The procedural history in this case alone demonstrates the unclear nature in the "*specific* contours of the law" and clearly shows that Principal Morse was not "plainly incompetent" and that she did not "knowingly violate the law." The federal trial judge, applying *Fraser*, ruled that she did not violate the student's First Amendment rights, reasoning that a school district is permitted to regulate speech that "might undermine the school's basic educational mission." The Ninth Circuit instead determined that Frederick's punishment for displaying his banner was "best reviewed under *Tinker*, rather than *Fraser*" and required the school district to show a "substantial disruption to its educational mission" to justify the discipline. *Frederick*, 439 F.3d at 1123. Even if the Ninth Circuit correctly applied *Tinker* rather than *Fraser,* and rightly found that the district failed to meet the substantial disruption bar, Principal Morse's "mistakes" on the law and the facts must be deemed

at least reasonable, thus entitling her to qualified immunity. The Ninth Circuit's determination that Principal Morse should have known that her actions were violating Frederick's "clearly established" free speech rights not only flies in the face of this Court's qualified immunity doctrine, but also is at odds with the determination of other courts that student free speech jurisprudence is "unsettled water ... rife with rocky shoals and uncertain currents." *Guiles*, 461 F.3d.at 321. *Accord Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1274 (11th Cir. 2000)(granting qualified immunity to school administrators who disciplined a student for displaying a Confederate flag on school grounds, and stating "it would be inappropriate to hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinions.").

Refusing to grant immunity to school administrators despite the lack of clarity over student free speech rights will have a deleterious impact on the more than 15,000 school districts and 225,000 school administrators across this nation. The fear of personal liability will deter administrators and school leaders from disciplining students in many situations in which regulation is proper and needed. A national survey, based on a random sample of middle and high school teachers and parents, shows almost unanimous support for the position that schools need good discipline and behavior to flourish and that part of a school's mission is to instruct students to follow the rules in order to become productive citizens. *Teaching Interrupted, Do Discipline Policies in Today's Public Schools Foster the Common Good?*, Public Agenda (2004), www.publicagenda.org. Both parents and teachers showed high levels of support for discipline commonly referred to as the "broken windows" approach in which schools strictly enforce little rules to create the right tone and to avoid larger problems. *Id.* at 5.

Allowed to stand, the Ninth Circuit's qualified immunity rationale will create a chilling effect for administrators following this approach and result in the discipline of students for inappropriate speech only in the most egregious circumstances.

So, too, will the fear of personal liability circumscribe student instructional venues, such as the Olympic Torch Relay, utilized by school districts to teach a variety of lessons that support their core educational mission because they are hampered in their ability to regulate and discipline students.

It is also foreseeable that the specter of personal liability will serve as a deterrent to qualified educators becoming school administrators. Given the current shortage of administrators in many areas of this county, the Ninth Circuit's decision will make it even more difficult to find qualified individuals to fill these positions. Del Stover, *Looking for Leaders, Urban districts find that the pool of qualified superintendents is shrinking*, Amer. Sch. Bd. J. (December 2002) www.asbj.com/specialreports/1202Special%20Reports/S2.html ("there are too few skilled administrators moving up the supply pipeline"; identifying that the most difficult position to fill in California is the high school principalship); Lynn Olson, *Principals Wanted: Apply Just About Anywhere*, Educ. Week (Jan. 12, 2000), www.edweek.org/ew/articles/2000/01/12/17leadside.h19.html?print=1 (indicating many teachers are disinterested in becoming administrators because position lacks appeal). Individuals who are taking these positions already do so at great personal sacrifice[22] and should not be burdened with

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[22] *See, e.g.*, Philip A. Cusick, *The Principalship? No Thanks. Why teachers won't trade the classroom for the office*, Educ. Week (May 14, 2003), www.edweek.org/ew/articles/2003/05/14/36cusick.h22html?qs=principal shortages&print=1 (identifying time demands, compensation issues, longer hours, and increased responsibilities of principals, which include school improvement, annual reports, accountability, core

the fear of lawsuits and personal liability simply for carrying out their daily disciplinary duties.

Taken together, the ill effects of the Ninth Circuit's mistreatment of qualified immunity will undermine the ability of schools to maintain discipline and operate according to their core educational mission. This surely is not a result the Supreme Court intends.

CONCLUSION

This Court should clarify existing student free speech jurisprudence in this country. At the heart of this Court's prior precedents is the recognition that school districts should be permitted to regulate speech that, in the reasonable professional judgment of school officials, undermines their core educational mission or interferes with maintaining a safe and effective learning environment for all students. Such regulation should encompass messages inimical to fundamental school and civic mores as defined by local school boards, such as messages touting illegal drug use, messages causing a substantial or material disruption to the work of the schools, speech that intrudes upon the rights of other students, and school-sponsored speech.

Although the present trilogy provides some distilled standards, the contours of student free speech jurisprudence in this nation are far from clear. Qualified immunity demands that the law be clearly established before its protections may be removed.

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curriculum, student safety, gender and equity issues, and staff development; attributing increase in principal responsibilities to "the way Americans think about schools—that they can be all things to all students").

For the foregoing reasons, this Court should reverse the decision of the Ninth Circuit Court of Appeals in this matter.

Respectfully submitted,

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No. 06-278

In The Supreme Court of the United States

DEBORAH MORSE;
JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the U.S. Supreme Court in numerous cases involving student rights in the public education setting, including Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98 (2001), and Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426 (2002), as well as in other cases with significant First Amendment issues such as Frazee v. Dep't of Employment Sec., 489 U.S. 829 (1989), and Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666 (1998). The Institute has also filed *amicus curiae* briefs in this Court on numerous occasions in cases raising First Amendment issues of the type raised in this case. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

One of the purposes of The Rutherford Institute is to work to preserve the maximum freedom for citizens to petition government, to express opinions in public forums without fear of repression or discrimination, and to enhance respect and protection for free speech rights guaranteed by the First Amendment. The Institute works diligently to promote a society where the free marketplace of ideas can predominate. The Rutherford Institute is furthermore

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[1] Counsel of record to the parties in this case has consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part.

dedicated to assuring that all citizens, including students, teachers, and school administrators, appreciate the delicate balance between the First Amendment's protection of free expression and the need for students to be well-educated, productive citizens of our democratic republic with a healthy respect for, and tolerance of, differing opinions and viewpoints and an understanding of rights granted under the Bill of Rights.

STATEMENT OF FACTS[2]

Respondent Joseph Frederick received a ten-day suspension from Petitioner Deborah Morse (the principal of Juneau-Douglas High School) as a result of Frederick's display of a banner at the Olympic Torch Relay procession as it passed through the streets of Juneau, Alaska, on January 24, 2002. The Notification of Suspension signed by Morse informed Frederick of the following violations set forth in the Student Handbook:

> *1.12 - Display of Offensive Material*
> *2.07 - Refusal to respond to staff directive regarding behavior*
> *2.17 - Truancy/Skipping*
> *2.05 - Defiant/Disruptive Behavior*
> *2.08 - Refusal to cooperate/assist in investigation*

(J.A. 107). The school disciplinary grid for these offenses permitted discipline if they occur on "other [than school] property during normal school hours or at school sponsored/sanctioned functions or activities outside of such hours." J.A. 22, 100, 103.

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[2] To the extent not stated below, *amicus* incorporates by reference the statement of facts set forth in the brief of Respondent Joseph Frederick.

Undisputed Facts. The Ninth Circuit properly recognized that Fed.R.Civ.P. Rule 56 permits summary judgment *only* when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] A number of factual contentions in this case are disputed, but the *undisputed* facts include the following:

- The Olympic Torch Relay was commercially sponsored by the Coca-Cola Company (J.A. 27).
- The Torch Relay promoted the upcoming international Winter Olympics, was open to the general public, and was conducted on the public streets of Juneau (J.A.9).
- A wide variety of speech activity occurred during the Torch Relay, including signs, yelling, singing, cheering, musical fanfare, banners, etc. (J.A. 23).

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[3] *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006). Petitioners' Brief mistakenly blends conflicting versions of disputed and undisputed material facts to reach a desired legal end. For example, the Brief states that "the student body remained under the supervision of high school administrators, teachers, and staff." Brief for Petitioners at 3. This assertion, however, is directly contradicted (i.e., disputed) by several student declarations indicating that many students were unruly throughout the event, with little control or meaningful supervision by school staff, and that some students left the event altogether. J.A. 32, 38. Likewise, while Petitioners argue that there were disruptions in school as a consequence of Respondent's display of the banner, Respondent submits that no such disruptions occurred. J.A. 37. Moreover, the nature of the disruptions suggests that it was Petitioner Morse's actions that caused any so-called disruptions, not the display of Frederick's banner. J.A. 43. Numerous other significant "disputed facts" that are identified in the following text above should be recognized as such and not relied upon as the basis for the Court's decision in this case. Otherwise, the case should be remanded for trial of these disputed issues.

- Respondent Frederick unfurled his banner on a sidewalk across the street from the school (J.A. 28-29) [4]
- The message on the banner read "Bong Hits 4 Jesus" (J. A. 10, 16, 24).
- Frederick had not attended school that day, but went directly from home to the Torch Relay (J.A. 28, 107, Frederick Declaration) (J.A. 42, Morse Declaration).
- Petitioner Morse imposed the previously described sanctions based on her decision that Frederick was participating in a school-sponsored event (J.A. 22, 100, 103, 107).

Petitioners also admitted that the banner caused no disruption in classroom work and that the censorship was justified primarily on grounds that it conflicted with the school system's anti-drug message (Petitioners' verified responses to Respondent's Interrogatories No. 4 and 5 (J.A. 108-09)). When asked in Interrogatory No. 4 to "[d]escribe all ways in which the display of the banner by the plaintiff and others during the Torch Relay disrupted classroom work at any school of the Juneau School District, the Petitioners replied simply: "Defendants do not contend that display of the banner disrupted classroom work." J.A. 108. And in response to Interrogatory No. 5, where Petitioners were asked to "[d]escribe all ways in which the display of the banner by the plaintiff and others during the Torch Relay disrupted the non-classroom educational process in any school of the Juneau School District," they responded:

> Display of a banner that would be construed by many, including students, district

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[4] The location where Frederick displayed the banner along the street is disputed. *Cf.* J.A. 28 (Frederick --- near swimming pool) with J.A. 41 (Morse --- in front of residences along the street).

> personnel, parents, and others witnessing the display of the banner, as advocating or promoting illegal drug use is inconsistent with the district's basic educational mission to promote a healthy, drug free life style. Failure to react to the display of such a banner at a school sanctioned event would appear to give the district's imprimatur to that message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior. Federal and state law require the district to keep the school environs drug free and to educate students on the dangers of using drugs and alcohol. The district's policies and strategic plan emphasize healthy, drug free lifestyles. The district's approved health curriculum teaches the dangers of using illegal substances. District policies and the JDHS student handbook prohibit the display of offensive materials, including materials that promote or advocate the use of illegal substances. The district's responsibilities as in loco parentis also require that messages advocating, or promoting use of illegal substances be removed, to the extent possible, from the learning environment, including the environment at school-sanctioned activities.

Notably, Petitioners' Interrogatory 5 Response is almost exclusively based on the school system's disagreement with the conflict between the content of Frederick's banner and the school system's viewpoint that any message by students making light of illegal drugs should be censored. The response does not document any actual disruption or disorder

in the school's educational functioning or mission as a result of the display of the banner. J.A. 109.[5]

Disputed Facts. Petitioner Morse's assertion that the Olympic Torch Relay was a "school sponsored/sanctioned" function or activity is disputed. She contends that she "decided to permit staff and students to participate in the Torch relay as an *approved social event or class trip.*" J.A. 22, 100, 103 (emphasis added).[6] Morse's assertions are disputed by several students who were released from school to attend the event. Student Micaela F. Croteau asserts in her Declaration that "the school allowed students to go out to the street to watch it. It was not a field trip, as no field trip form had to be filled, and parental consent was not required." J.A. 36. Student Sara Croteau likewise states that "when the torch relay was being run near our school, the teacher announced that we could go watch it. Some students did, others did not, and the teacher made no effort to keep those of us who did go out together." J.A. 38. She also declares that "[m]any people got bored and left. The school administrators weren't stopping any of the people who left." *Id.* Student Melinda Madsen declares that "my teacher released us to go see the relay, but we did not have to stay together or stay with the teacher. The area outside the school was crowded and chaotic.... I saw some of my classmates go to their cars. It was easy to slip away. I noticed a few other students did not come back to class after the relay was over, and the teacher noticed their absence but they didn't get into trouble." J.A. 32. Respondent Frederick was not in class

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[5] Petitioner Morse described a subsequent protest of the school's censorship of Frederick's message but did not allege any direct disruption of school order arising *solely* from the display of Frederick's message, as opposed to protest of the censorship. J.A. 43.

[6] This wording is notably different from the school disciplinary code which permits punishment for offensive speech "at *school sponsored/sanctioned functions or activities* outside of such hours." *Id.*

prior to the event and disputes that it was a school-sponsored event (J.A. 55). These student assertions are disputed by Petitioner Morse. J.A. 55-56.[7]

The meaning of Frederick's message, "Bong Hits 4 Jesus," is also disputed. Morse interpreted that it "would be widely understood by high school students and others as referring to smoking marijuana" and "advocating drug use." J.A. 24, 25. Frederick indicated it had a more light-hearted meaning, having seen it being used by a Mardi Gras group opposing religious fundamentalists picketing that event. J.A. 28. Student Micaela Croteau said she was "not sure what Joe meant by the saying on the banner. I just took it to be an attempt by Joe to be outrageous or funny, but no one took it seriously as saying anything about drugs or about religion." J.A. 37. Student Melinda Madsen didn't know what it meant but didn't think it promoted illegal drug use. J.A. 33. Fellow student Makana Field, who helped select the phrase, said the following:

> My friend Joe Frederick and I got the idea of displaying a banner when the runners came by. I'm not sure where we got the phrase, "Bong Hits 4 Jesus," but I know we thought it was funny, so that's why we used it. It didn't have any particular meaning. It definitely wasn't meant to say anything encouraging

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[7] Seeking to refute the student contentions, Petitioners also submitted to the District Court four *completely identical* Declarations from several teachers (subordinate to Morse), contending with respect to each of the students who provided affidavits that "I elected to let my students go out to observe the passing of the Olympic Torch as a *school sponsored* and *supervised* event." J.A. 47-53. The Joint Appendix has been printed and does not contain the original affidavits, but the originals filed with the District Court were each the same prepared form with blanks filled in for the names of the students and signed by each teacher. *See* Respondents' Supplemental Excerpts of Record filed with the United States Court of Appeals for the Ninth Circuit, No. 03-35701, pp. 70-77.

> drug use or to say anything about religion. I don't know any students who took it to have a drug meaning, though there was one student who thought we were making a comment about religion.

J.A. 34. Indeed, in the context of the event, Frederick's message might even be interpreted as a protest against Olympic ideals which, though viewed widely as meritorious, are no less subject to critique than any other societal event or endeavor.

Summary. The only *undisputed* facts in the record, and the only facts that should be relied upon for decision under Fed.R.Civ.P. Rule 56, are the following: (1) Respondent Joseph Frederick displayed a banner containing the message "BONG HITS 4 JESUS." (2) The display occurred on a public sidewalk across the street from Juneau-Douglas High School, the school in which he was enrolled as a student. (3) Frederick had not gone to school prior to the event. (4) The display occurred during the 2002 Olympic Torch Relay during which citizens, including students released from class, observed the procession and expressed themselves in a variety of ways as runners carried the torch through the streets of Juneau, Alaska. (5) Petitioner Morse suspended Frederick ten days from school for displaying an offensive banner (and for related offenses) at what she viewed as an approved social event or class trip.

SUMMARY OF ARGUMENT

This case will have a critical impact on the First Amendment rights of student-citizens expressing their views off school property. Student speech occurring away from school property should not be made subject to rote application of school rules based on an administrator's perception of what is and is not a "school-approved activity." Rather, unless the student is formally representing the

school, restrictions on off-campus student speech should be determined according to the reasonable and principled standards that apply to the forum where the speech occurs.

Just as students do not forfeit their First Amendment rights upon entering the schoolhouse gate, so too, schools cannot censor student speech uttered in quintessential public forums solely based on rules that otherwise might be proper within the school. Moreover, a school system's desire to advance an anti-drug point of view does not require students to forfeit the right to oppose that viewpoint outside the schoolhouse gates. In most instances, schools must be required to justify restrictions on off-premises student speech by demonstrating a compelling governmental interest that is narrowly tailored to achieve a legitimate governmental objective. *See Perry Education Association v. Perry*, 460 U.S. 37, 45 (1983). In other words, unless students are on school property, or formally representing the school system, student speech outside the schoolhouse gates cannot be restricted any more than the legitimate restriction of utterances by adult members of the community in the same forum. Restrictive school policies, designed to maintain order in the classroom or on school premises, are not necessarily appropriate for student speech in public places adjacent to schools which by long tradition have been devoted to assembly and debate, such as streets, sidewalks, and parks. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Grayned v. City of Rockford*, 408 U. S. 104 (1972). Likewise, punishment for off-campus expression of a viewpoint that conflicts with the school system's preferred message constitutes unlawful viewpoint discrimination.

Finally, Petitioners' misguided attempt to obtain unprecedented control over off-campus student speech, if sustained, will greatly undermine First Amendment values and send the wrong message to upcoming citizens. Student speech has often prompted, and even produced, broad cultural and political change. If administrators were accorded the power to censor and punish students for off-

campus speech or protest, including civil disobedience such as that seen during the Civil Rights and Vietnam Eras, the Nation and its political dialogue would suffer indescribable loss. It would create a constitutional double standard that would destroy the public school system's credibility among America's youth and cripple its role in educating students about the importance, as well as the prudent and proper exercise, of constitutional freedoms.

ARGUMENT

I. Frederick's Speech Is Not Governed By The *Tinker* Trilogy Because The Speech Did Not Occur At School Or In A Manner Reasonably Believed To Constitute Representation Of The School.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) ("*Tinker*"), this Court declared the vital importance of student speech and the protection it deserves, even on school campuses:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

While school officials have greater latitude in regulating the speech of students occurring within the context of the educational environment, *Tinker* also made clear at the same time that "state-operated schools may not be ***enclaves*** of totalitarianism." *Id.* at 511. *Tinker* and its progeny dealt with student speech that either occurred within the metes and bounds of the school, at school assemblies, or in school curriculums. *Id.*; *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) ("*Bethel*"); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) ("*Kuhlmeier*"). This Court should, therefore, carefully scrutinize Petitioners' attempt to expand disciplinary powers to student speech uttered *beyond* the schoolhouse gates.

The Court's opinions in *Tinker*, *Fraser*, and *Kuhlmeier* clearly applied to speech that occurred *within* the physical boundaries of the school campus. For example, the majority opinion in *Tinker* confined its rationale to "[a]ny word spoken, ***in class, in the lunchroom,***" *Id.*, and "in ***the cafeteria, or on the playing field, or on the campus*** during the authorized hours. . . ." *Id.* at 512-13 (emphasis added). Likewise, the *Fraser* case was decided on the basis that "[a] ***high school assembly or classroom*** is no place for a sexually explicit monologue directed toward an unsuspecting audience of teenage students." *Bethel*, 478 U.S. at 685 (emphasis added). And in *Kuhlmeier*, which involved censorship of sexual material in a student newspaper prepared as part of the school's journalism curriculum, the Court stated that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission'...*even though the government could not censor similar speech* ***outside the school***." *Kuhlmeier*, 484 U.S. at 266 (emphasis added). Significantly, the *Kuhlmeier* Court viewed the geography of speech uttered in schools as different from that in other forums, recognizing that "[t]he public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of

mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* at 268 (citing *Hague v. CIO*, 307 U.S. 496 (1939)).

In contrast to *Tinker* and its progeny, the venue in the present case *does* contain the "attributes of streets, parks, and other traditional public forums" and few, if any, of the "special characteristics" of the school environment or any disruption of that environment that would be inconsistent with the normal functioning of the school. The speech not only occurred off school property, but in a traditional public forum independent of Frederick's status as a student at Juneau-Douglas High School. Unlike the previous cases, Frederick did not attend school prior to the Relay event and was not released from class. At the moment he was punished for his speech, he was on a public sidewalk off school grounds and was simply one individual among many attending a public event and, as such, had the same freedom to express his own opinions as anyone else attending the event.

This was not an event involving participants in a school-sponsored athletic event or extracurricular activity involving other schools. Moreover, Frederick clearly was not representing the school, for example, as a cheerleader or band member. He displayed no indicia of the school. He was not wearing a school uniform. If so, the underlying principles of *Tinker* might reasonably apply by virtue of his formal representation of the school or because of conduct on another school campus. In such instances, Frederick would be participating and identified as formally representing the school, and/or conducting himself on another school campus in that capacity and would, therefore, be governed by restrictions aimed at preventing any material disruption that could be perceived as occurring in the name of the school. In those circumstances, the *Tinker* interests in preventing disruption of the academic environment or avoiding substantial disorder, or invasion of the rights of others might

be appropriately extended beyond the schoolhouse gates and into the broader community.

Because the interests of the school are more highly attenuated in a public forum and are highly dependent on the context of student action in such a forum, this Court's prior holdings in *Tinker* and subsequent cases fail to provide the complete framework in which to adjudicate the facts at issue in this case. This Court should, therefore, reject Petitioners' contention that the *Tinker* progeny mandate affirmance of the Petitioners' discipline of Frederick. Instead, the Court should consider the material facts in the light of this Court's precedents dealing with speech in a public forum immediately adjacent to a school facility. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Grayned v. City of Rockford*, 408 U. S. 104 (1972).

II. Frederick's Speech Occurred In A Traditional Public Forum And Therefore Should Have Been Afforded The First Amendment Protections For Such Forums Regardless Of The Fact That He Was A Student.

A. Frederick's Status As A Citizen Speaking On The Public Sidewalk Adjacent to a School Entitled Him To the Full Protections of The First Amendment.

The place and geography where speech occurs is a critical factor in determining the level of protection afforded under the First Amendment. *Frisby v Schultz*, 487 U.S. 474 (1988); *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 802 (1985). This Court has stated that "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Education Association v. Perry*, 460 U.S. 37, 45 (1983). "At one end of the spectrum are streets and parks

which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." *Id.*, citing *Hague v. CIO*, 307 U.S. 496, 515 (1939). "A speaker who takes to the street corner to express his views...[is] free from interference by the State based on the content of what he says." *Hurley v. South Boston Allied War Veterans Council*, 515 U.S. 557, 579 (1995) ("Hurley").

Frederick's speech occurred on a public sidewalk during the Olympic Torch Relay parade conducted on a public street across from a public school in the midst of a large group of citizens expressing themselves within and without the Relay. The only difference between Frederick's speech and that of other spectators at the event is that school officials disapproved of Frederick's message. While other spectators observed the parade and expressed themselves without limitation, when Frederick displayed his banner, Petitioner Morse crossed the street, shaking her head, and told him, "not here." J.A. 29-30. When Frederick asked about the Bill of Rights and freedom of speech, Morse tore the banner from him because she "felt that it violated the policy against displaying offensive material, including material that advertises or promotes use of illegal drugs." *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006). While Frederick's choice of words may have been distasteful to many and contrary to the school's desire to promote anti-drug messages, the school is not free to censor Frederick's speech in a traditional public forum without a compelling state interest. As this Court stated in *United States v. Grace*, 461 U.S 171, 177 (1983), which involved the exercise of free speech on the sidewalk of this Court:

> In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner

> regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn.*, supra, at ----, 103 S.Ct., at 955. See e.g., *Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640, 647, 654, 101 S.Ct. 2559, 2563, 2567, 69 L.Ed.2d 298 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972); *Cox v. Louisiana* (Cox II), 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest. See, e.g., *Perry Education Assn.*, supra, at ----, 103 S.Ct., at 955; *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

Moreover, as this Court made clear in the *Hurley* case (which involved a St. Patrick's Day parade on a public street), "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 408 U.S. at 579. Even in *Tinker*, the Court made clear that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. Although Frederick's message was not popular and even of

questionable appropriateness at such an event, it was presented in a traditional public forum where speech and messages were not only expected but, in fact, occurred, and without disruption of the normal functioning of the school. Consequently, Frederick's speech was protected under the First Amendment and could not be censored merely because the school disapproved of the message or its content.

B. The School System Is Not Free To Engage In Content-Based Regulation Of Frederick's Speech In A Traditional Public Forum Without Demonstrating A Compelling State Interest.

Courts are typically reluctant, for obvious reasons, to interfere with the administration of school discipline. The traditional "willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." *Id.* When it is suggested, however, that school disciplinary authority should reach beyond the schoolhouse gates, traditional judicial deference is no longer appropriate. Barring extraordinary circumstances, ordinary constitutional principles apply just the same as they do to all citizens. Those principles require the following inquiry: Was the speech of a type protected by the First Amendment? What is the nature of the forum where the speech occurred? Was the speech proscribed or regulated based on content? Was the state seeking to advance a legitimate and compelling interest? And, if so, were the means narrowly tailored to achieve that state objective, and did it provide for ample alternative channels of communication? *See Perry Education Assn v. Perry Local Educators Assn*, 460 U.S. 37, 45 (1983); *Cornelius v.*

NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 797-99 (1985).[8]

As previously indicated, there can be no question that the display of Respondent Frederick's banner on a public sidewalk during a public parade was protected speech in a traditional public forum or that it was censored based on the content of its message. The Petitioners' unlawful discrimination based on the content/viewpoint of Frederick's banner is itself enough to invalidate the Petitioners' action. Likewise, the asserted state interest in preventing the disruption of school is insufficient in the circumstances of this case to justify the censorship that occurred. And, in any event, the school's action was clearly not narrowly tailored in the circumstances of this case to reach only speech that would potentially disrupt school.

Two cases decided by this Court govern demonstrations on public sidewalks adjacent to public school buildings: *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In each case, this Court considered the speech in question, the nature of the forum, whether speech was censored based on content, and whether the state had advanced a legitimate interest in censoring the speech. In both cases, the Court took into account *Tinker*'s concern with school disruption in analyzing whether demonstrations or picketing by students and others on public sidewalks

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[8] "In [traditional] public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn v. Perry Local Educators Assn*, 460 U.S. at 45.

adjacent to schools could be prohibited or censored based on content.

In *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972) ("*Mosley*"), Earl Mosley challenged a Chicago ordinance that would have prevented him during school hours from "*walk[ing] the public sidewalk adjoining the school*, [and] carrying a sign that read: 'Jones High School practices black discrimination. Jones High School has a black quota.'" *Id.* at 93 (emphasis added). Citing *Tinker*, the Court indicated that the City had a legitimate interest in "preventing school disruption" but found that "[p]redictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."[9] In the context of Chicago's determination that "peaceful labor picketing during school hours is not an undue interference with school," the Court found that the ordinance proscribing other picketing was not "tailored to a substantial governmental interest" and that "the discrimination among pickets is based on the content of their expression." Id. at 99, 102. In doing so, the Court made clear that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. The Court said:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, *free from government censorship*. The essence of this forbidden censorship is

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[9] Citing *Tinker*, the Court noted that "'(I)n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 508, 89 S.Ct. at 737."

> content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 270, 84 S.Ct. at 721.
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, *government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.* Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id. at 96 (emphasis added). The essence of the *Mosley* decision was, therefore, unlawful content discrimination in a public forum, a principle that is directly applicable in this case. Surely Joseph Frederick's rights to free speech in that forum (when he was not formally representing the school) should be no less than those of any adult who chose to protest the Olympic Relay or to advance a message contrary to the school system's preferred message in that forum.

In *Grayned v. City of Rockford*, 408 U.S. 104, 105 (1972) ("*Grayned*"), Richard Grayned, a student, was one of 200 demonstrators in front of West Senior High School in Rockford, Illinois, who:

> marched around *on a sidewalk* about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists.

Id. (emphasis added). Grayned was convicted of violating an anti-picketing ordinance virtually identical to the Chicago ordinance in the *Mosley* case and for violating an anti-noise ordinance proscribing "any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." *Id.* at 108. The Court reversed the conviction under the anti-picketing ordinance based on *Mosley*'s anti-content discrimination ruling *(Id.* at 107), but sustained Grayned's conviction under the anti-noise ordinance. It recognized that *Tinker* was the "touchstone" for determining whether restrictions on speech "around a school" are constitutional. *Id.* at 117. Referring to *Tinker*, the Court said:

> But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but *only if* the forbidden conduct "materially disrupts classwork or involves substantial disorder or

> invasion of the rights of others." *Id.* at 513, 89 S.Ct. at 740.

Grayned v. City of Rockford, 408 U.S. at 117-118 (emphasis added). The Court concluded that expressive conduct like "[n]oisy demonstrations that disrupt or are incompatible with normal school activities...next to a school, while classes are in session, [ ] may be prohibited." *Id.* at 120. Accordingly, after careful analysis of the facts and circumstances, Grayned's conviction was upheld specifically because (1) the noise ordinance "punishes *only conduct which disrupts or is about to disrupt normal school activities*," and (2) "Rockford's modest restriction on some peaceful picketing represents *a considered and specific legislative judgment* that some kinds of expressive activity should be restricted *at a particular time and place*, here in order to protect the schools." *Id.* at 119, 121 (emphasis added). At the same time, the *Grayned* Court also recognized that any disciplinary decision must be made "on an individualized basis, given the particular fact situation," and that "[d]ifferent considerations, of course, apply in different circumstances." *Id.* at 119, 120, n. 45. It further made clear that "[p]eaceful picketing which does not interfere with the ordinary functioning of the school is permitted" and that the "ordinance gives no license to punish anyone because of what he is saying." *Id.* at 119.

The facts in *Grayned* are different from the present case. Obviously, the present case does not involve a noise ordinance as applied to the specific situation near the school. Likewise, the school's authority to interfere with Frederick's speech was not, as in *Grayned*, specifically limited to a particular time or place. Most importantly, there was no disruption, and no potential disruption, of any classroom or of "the ordinary functioning of the school." In addition, Petitioner Morse admittedly censored Frederick's speech *because* of its content. In sum, Morse's censorship of Frederick's message not only failed to advance a compelling

state interest as applied to the context of the event, it impermissibly discriminated against the content and viewpoint of Frederick's speech. The principles of *Mosley* and *Grayned* thus require affirmance of the judgment below.

Though clearly not binding on this Court, the Second Circuit's decision in *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043, 1048 (2nd Cir. 1979) ("Thomas"), is also instructive since it was decided upon directly analogous facts. *Thomas* involved the suspension of students for producing the off-campus publication of a magazine called *Hard Times*—a sophomoric newspaper containing sexual satire emulating the *National Lampoon*. Calling the First Amendment "the ultimate safeguard of popular democracy," the Court declared that "[w]hen an educator seeks to extend his dominion beyond [the schoolhouse gate]...he must answer to the same constitutional commands that bind all other institutions of government." *Id.* at 1043. The court distinguished the case from *Tinker* based on the location of the speech, noting that "[w]hile prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate." *Id.* at 1050. The Court ruled that "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id.* Those principles invalidated the students' suspensions in *Thomas*.[10]

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[10] Although there are federal cases finding that school officials have the authority to punish students for speech occurring off campus, unlike *Thomas* and the case at hand, the students' written and published speech in those cases was brought onto the school grounds. See *Boucher v. School Board of the Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387 (D. Minn. 1987), aff'd 855 F.2d 855 (8th Cir. 1988); *Sullivan v. Houston Independent Sch. Dist.*, 475 F.2d 1071 (5th Cir. 1973).

Sound public forum principles govern off-campus student speech and take full account of the forum, the speech in question, the context of the event and the participants, and the governmental interests involved in regulating speech. Like that of the Granville students in the *Thomas* case, Frederick's speech clearly occurred outside the metes and bounds of the school in a quintessential public forum—a public sidewalk during a publicly-viewed parade promoted by a commercial sponsor, commemorating an international public event, surrounded by people who themselves were engaged in various types of expression. There was admittedly no disruption of school. It was in this context that Frederick unfurled his banner with a message expressing disdain for the event, in effect mocking it with a silly message. This does not disqualify it as protected speech under the First Amendment, nor does it permit the school system to censor it because of embarrassment or because it otherwise disagrees with its message.[11]

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[11] The Solicitor General attempts to transform this case into a referendum on society's effort to eliminate the scourge of illegal drugs and, in effect, to impose the school system's anti-drug orthodoxy on students throughout the community. Brief of the United States As *Amici Curiae* Supporting Petitioners, pp. 11-14. He argues, in essence, that censorship of dissident student speech relating to drugs—whether on, or off, school grounds—is an essential part of the cure of the drug problem. Petitioners' incursion on Frederick's speech, he argues, should be permitted because "student advocacy of illegal drug use at a school event is manifestly inconsistent with a public school's educational mission." *Id.* at 11. Not only does this argument beg the question as to the context of Frederick's speech, it reduces First Amendment values to the level of a public policy debate and ignores the fact that governments have other far more diverse, and extensive, means and resources of addressing the problems surrounding illegal drug usage. The question of whether drug use should be legal or illegal is a substantial social question that is the subject of extensive societal debate. Indeed, this Court has recently decided cases in which drug use has been legalized by the vote of more than one State legislature. *Gonzales v. Raich*, 545 U.S. 1 (2005). The remedy for solutions to such questions is more, not less, speech. The virtually unlimited censorship powers advanced by the Solicitor General would not only result in grossly overbroad and unprecedented violation

C. The School System's Anti-Drug Message Is Not A Permissible Compelling State Interest In A Traditional Public Forum. And Even If It Were, It Was Not Drawn In The Least Restrictive Means Available.

In traditional public forums, government may not prohibit all communicative activity. Nor may it enforce a content-based exclusion of speech without demonstrating a compelling state interest that is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461 (1980). "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."

While the school arguably has a compelling interest in insuring a drug-free environment within the school and in proscribing pro-drug messages on campus or where students

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of the First Amendment by unwitting school officials, it would disserve students and the body politic.

Likewise remarkable is the Solicitor General's appalling distortion of the *Tinker* progeny to advance these ends. He argues that schools may censor student speech if it is "inconsistent with their basic educational mission in order to disassociate themselves from such speech." *Id.* at 19. But *Tinker* permitted student speech to be restricted *only* if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. And *Kuhlmeier* and *Fraser* only permitted censorship of student expression in school programs integrally related to their mission; that is, during an in-school, student assembly (*Fraser*) and in a school newspaper written and edited by a journalism class as part of its journalism curriculum (*Kuhlmeier*). Those circumstances are not even remotely close to this case. The Solicitor General's attempt to recast *Fraser* and *Kuhlmeier* into what is, in effect, "zero tolerance" rhetoric with application throughout the community, in order to squelch speech about drugs, is astounding and should be rejected as wholly inconsistent with those precedents and the Bill of Rights.

formally represent the school system in academics, athletics, or extracurricular activities or on other school properties, that interest ceases when students leave the schoolhouse grounds to participate in a public event on public streets and sidewalks. At that time, a student's right to advocate a particular point of view cannot be disturbed by government based on the arbitrary predilections of school administrators about the message conveyed. When students leave school property (whether authorized or not) and assimilate themselves into the day-to-day flow of ordinary society, policies designed to contribute to enforcing compulsory attendance and the educational process on school property are significantly less compelling. Indeed, this Court has held that the student's right to privacy and to make individual decisions while away from school, and even from parents, is significant and involves much higher-stakes issues than speech. *Cf., e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). However much the school may be permitted to act *in loco parentis* within the school grounds, it may not do so without the schoolhouse gates where important free speech interests are involved. Unless there is demonstrable disruption of the normal functions of the school, student speech on issues of public importance uttered off school premises in public forums is no more subordinate in terms of the constitutional protections than that afforded to other speech. Outside school, student speech has had important and significant impacts in our local and national political life. During the Civil Rights movement and the Vietnam War era (as *Tinker* itself demonstrates within the school environment), student speech was central in raising questions about the conduct of public policy. Here, the school system's attempt to silence messages voiced outside school premises contrary to its own is nothing less than classic viewpoint discrimination.[12]

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[12] If school administrators are granted authority to punish speech occurring off school grounds, the effects are potentially dire. As Judge Kaufman warned in the *Thomas* case:

It is also clear that there were significantly more limited and appropriate ways that Principal Morse could have addressed the issue of Frederick's off-campus speech. Rather than indulge the undiscriminating instinct to punish contrarian off-campus speech, Principal Morse, and other teachers in the school system, could have used the occasion for an educational moment, i.e., to cause students to analyze the situation, to ask them what they thought the message was, why it was published, why it should have been permitted, whether it should have been removed, and then, in that context, reaffirm the dangers of drug abuse, the possible inappropriateness of the message at the event, and the importance of the right to free speech outside school.

This Court noted in *West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), "[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere

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> It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of National Lampoon...at a neighborhood newsstand and lends it to a student friend. And, it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *Parens patriae*.

Thomas, 607 F.2d at 1051.

platitudes." This warning was echoed by Judge Frank Easterbrook fifty years later in another public school Free Speech case where he wrote, "Far better to teach [students] about the first amendment, about the difference between private and public action, about why we tolerate divergent views. Public belief that the government is partial does not permit the government to *become* partial." *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993). As Judge Easterbrook explained, when challenging or offensive ideas are raised in schools under the umbrella of free speech, "[t]he school's proper response is to educate the audience rather than squelch the speaker." *Id.*

Educating students on the importance and history of the First Amendment and free speech, along with the dangers and perils of drug use, would have served the students of Juneau-Douglas High School far better than the disruption created by the misguided suspension of Joseph Frederick. No matter what state interest the school sought to advance in punishing Frederick, it clearly was not the least restrictive means available, nor the most effective.

CONCLUSION

The public schools cannot be expected to cure all of America's social ills. There is, and must remain, a line over which school administrators cannot transgress into the views and daily lives of students and parents. That line is the schoolhouse gate, or where students cease to act as formal representatives of the school system. Absent the direct and substantial disruption of the normal functioning of the school, the discipline of students away from school is the job of parents and law enforcement officers, not school officials. This Court should, therefore, affirm Respondent Frederick's First Amendment right to free speech off-campus and affirm the Ninth Circuit's ruling.

Date: February 15, 2007.

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No. 06-278

IN THE
Supreme Court of the United States

DEBORAH MORSE, ET AL., PETITIONERS,

v.

JOSEPH FREDERICK, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STUDENT PRESS LAW CENTER, FEMINISTS FOR FREE EXPRESSION, THE FIRST AMENDMENT PROJECT, THE FREEDOM TO READ FOUNDATION, AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the First Amendment protects off-campus student expression from viewpoint-based censorship by public school officials when the speech is not disruptive, plainly offensive or school-sponsored.

2. Whether the court of appeals properly denied qualified immunity to a public high school principal who violated clearly established law under the First Amendment by suspending a student for constitutionally protected, off-campus, non-disruptive speech simply because of the school's disagreement with the viewpoint of his message.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

This brief, in support of respondent Joseph Frederick, is submitted to the Court with the consent of the parties to the case. As detailed below, *amici curie* are committed to protecting the free speech and free press rights of students and journalists. Because of the potential impact this litigation could have on the First Amendment rights of students, *amici* have a strong interest in the outcome of this case.

Student Press Law Center (SPLC) is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the school-sponsored and independent student press, the SPLC collects information on student press cases nationwide and produces a number of publications on student press law, including its book, LAW OF THE STUDENT PRESS (2d ed. 1994) and its thrice-yearly magazine, the *SPLC Report*. SPLC provides legal help and information to more than 2,500 SPLC student journalists and journalism educators each year.

Feminists for Free Expression (FFE) is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view and produce expressive materials free from government intervention. Since 1992 FFE has worked actively to oppose the misapprehension that censorship may sometimes be in the interest of women and others who feel unequally treated by society, believing that the goal of equality is inextricably

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

linked with the values enshrined in our Constitution's free speech clause.

The First Amendment Project is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. It provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center's sole mission is the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. A particular focus of the Center's litigation and program efforts has been the relationship between the First Amendment and academic freedom.

STATEMENT

Respondent Joseph Frederick was eighteen years old when the Olympic torch relay came through his hometown of Juneau, Alaska. J.A. 9, 15. The torch relay, which was sponsored by Coca-Cola and other private groups, was part of the build-up to the 2002 Winter Olympic Games in Salt Lake City. Pet. App. 2a. The event drew a great deal of

attention in Juneau: citizens lined the streets to watch, the public high school released its students, and national television cameras were on hand to record the festivities. *Id.*

Frederick and his friends joined the crowd that gathered on a public sidewalk and waited peacefully for the torch to arrive. *Id.* As the torch passed, they unfurled a banner that read "Bong Hits 4 Jesus." J.A. 10, 16. The display of the banner, according to Frederick, was an attempt to assert his First Amendment rights. *Id.* at 28. The message was selected to be humorous, ambiguous, and provocative enough to make a statement about the freedom of speech. *Id.*

Frederick, a senior at Juneau-Douglas High School, had not set foot on school property that morning, but he was standing across the street from the school when he unrolled his banner. *Id.* at 9-10, 15. Petitioner Deborah Morse, the school's principal, spotted the banner and left school grounds. She crossed the street to the public sidewalk and demanded that Frederick put the banner down. *Id.* at 24. Frederick asked her about his First Amendment rights, and Morse replied that the banner was not appropriate for display. *Id.* at 24-25. When he refused to take his banner down, Morse grabbed it and crumpled it up. *Id.* at 25, 30. Morse suspended Frederick for ten days. *Id.* at 26.

Frederick unsuccessfully appealed his suspension to the school superintendent and the school board. Pet. App. 26a. He then filed a lawsuit under 42 U.S.C. §1983 alleging a violation of his First Amendment rights. *Id.* The District Court granted summary judgment to the Petitioners. *Id.* at 40a. On appeal, a panel of the Ninth Circuit Court of Appeals unanimously reversed and held that the school's actions were unconstitutional under this Court's decision in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). *Id.* at 7a. The court of appeals found Petitioners had conceded that Frederick was punished for the viewpoint

of his message and not out of any concern of a likelihood of disruption to the school's mission, and it therefore concluded that Morse had violated Frederick's First Amendment rights. *Id.* at 18a. The court explained, "a school cannot punish students' speech merely because the students advocate a position contrary to government policy." *Id.* at 8a. Based on this clearly established law, the court of appeals held that Morse did not have qualified immunity. *Id.* at 21a. Petitioners' request for rehearing en banc was unanimously rejected. *Id.* at 46a.

SUMMARY OF ARGUMENT

This case involves significant constitutional issues about the right of public school students to engage in independent speech free from official censorship or punishment. In this case, Frederick peacefully displayed a banner with a message of his choice on public property and at a public event. Had the other Juneau residents standing around him on that crowded public sidewalk engaged in this simple act, the First Amendment would have protected them.

But unfortunately for Frederick, two facts were used against him. First, he was a public high school student. And, second, he chose to express himself during traditional school hours (although students from his school had been released and he was not in attendance at school that morning). In Petitioners' view, these two facts strip Frederick of his constitutional freedom of expression and empower Petitioners with the authority to censor Frederick simply because they disagree with his message (or at least their personal interpretation of his message). Basic constitutional rights do not slip away so easily, however, and this Court's decisions do not invest school officials with such sweeping power over the entirety of students' lives.

The planning, creation and display of Frederick's speech occurred completely off school grounds and without school resources. Thus it was the school principal—not Frederick—who quite literally crossed the line between a non-public and public forum when she left school property, marched across the street, and grabbed Frederick's banner. And because Petitioners censored Frederick based on their disagreement with the content of his message, this was not a "time, place, or manner" restriction. Rather, this is a case of unconstitutional viewpoint discrimination.

Petitioners nonetheless contend that the commercially sponsored torch relay was a "school sanctioned" event, thus freeing them to censor and punish Frederick. This unique argument is unsupported by this Court's precedents, which do not give schools the ability to "sanction" a public or community event and thereby give themselves censorship powers over their students. There is likewise no constitutional exception, as Petitioners argue, for "subject-changing" speech that diverts the audience's attention away from the school's preferred message. Contrary to Petitioners' arguments, student expression outside of school is appropriately regulated by parents and the First Amendment—not by school officials.

Even under this Court's precedents regarding student speech while at school, however, Petitioners' argument should fail. Frederick's speech was not school-sponsored nor was it lewd or vulgar speech at a school assembly. And there was no evidence that it substantially disrupted the work of the school. Petitioners contend that Frederick is without constitutional protection because his speech allegedly was not political. But *Tinker* does not protect only overtly political speech. Frederick, meanwhile, consistently and repeatedly has stated that by asserting his First Amendment rights he was making a statement about the role of free speech in America's schools. There is furthermore no

evidence that he intended it to be a pro-drug message or that any student who saw his banner interpreted it as such.

Because Petitioners' actions violated clearly established law, they are not entitled to qualified immunity.[2] A ruling in favor of Petitioners, moreover, could chill a range of student speech and undermine the constitutional safeguards ratified by this Court for almost forty years.

This nation entrusts public schools with the vital task of teaching their students about the rights and responsibilities of living in a democracy. Yet many of these students face a common problem: the difficult task of speaking out and being heard despite the opposition of their school administrators. For this reason, the Constitution prohibits school officials from censoring students except in narrowly limited circumstances. Because none of those circumstances is present in this case, *amici curiae* respectfully request that this Court rule in favor of Respondent.

ARGUMENT

I. RESPONDENT'S SPEECH WAS NOT SCHOOL SPEECH, BUT RATHER INDEPENDENT EXPRESSION THAT IS FULLY PROTECTED BY THE FIRST AMENDMENT

A. Outside Of the School Environment, Respondent's Constitutional Right To Be Free From Government Censorship Is No Different From That Of Any Other United States Citizen

This Court unambiguously has held that restraints on free expression are among the most disfavored acts in our constitutional system. See, e.g., *United States* v. *Playboy*

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[2] *Amici curiae* respectfully submit that Petitioners' actions were unconstitutional under clearly established law. This brief does not otherwise address the second question presented to this Court in this case.

Entm't Group, Inc., 529 U.S. 803, 817 (2000) ("It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed.").

An individual's status as a public high school student, moreover, does not destroy these basic rights. As this Court held in *Tinker*, "[s]tudents in school as well as out of school are 'persons' under our Constitution." 393 U.S. at 511. And this constitutional personhood entitles them to "fundamental rights which the State must respect." *Id.*[3] Foremost among these is the freedom of expression.

While finding that Petitioners clearly violated Frederick's constitutional rights, the court of appeals nonetheless analyzed this case under this Court's school speech precedents for two simple reasons: "Frederick was a student, and school was in session." Pet. App. 6a. Petitioners have adopted this position with little additional argument. But Frederick's status as a public school student does not convey to Petitioners such broad powers of censorship.

This Court repeatedly has noted that its student speech framework does not apply when the speech occurs outside of school. As Justice Brennan explained in his concurrence in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), "[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's opinion does not suggest

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[3] Petitioners cite to John Stuart Mill to make an argument that even such a strong defender of staunch free speech rights as Mill, did not extend this right to "'children or [y]oung persons below the age which the law may fix as that of manhood or womanhood.'" Pet. Br. 19 n.4. In this "as applied" challenge, however, it is important to repeat that Frederick at the time was an 18-year-old adult citizen of the state of Alaska.

otherwise." 478 U.S. 675, 688 (1986) (citations omitted). Similarly, in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), this Court recognized limited circumstances where schools could suppress student speech "even though the government could not censor similar speech outside the school." 484 U.S. 260, 266 (citations omitted); see also *Porter* v. *Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 & n. 22 (5th Cir. 2004) (holding that a student drawing was not "student speech on the school premises" because it "was composed off-campus and remained off-campus for two years"); *Thomas* v. *Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050-52 (2d Cir. 1979) (refusing to apply *Tinker* to student newspaper published and distributed off-campus); *Bystrom* v. *Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) (stating that burden of high school officials to justify censorship or punitive authority over off-campus student speech would be "much greater, perhaps even insurmountable" than over on-campus speech); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U.J. SCI. & TECH. L. 243, 269-272 (2001) (noting that *Tinker* is ill-suited to deal with off-campus student expression).

In this case Frederick's speech occurred on public property during a commercially sponsored community event that was open to the public. J.A. 9-10, 15-16. The planning, creation and display of Frederick's message occurred entirely off of school property. *Id.* at 28. Frederick's speech was not part of a school class or extra-curricular project and he used no school resources for its creation. Nothing about Frederick's speech carried the name, insignia or other imprimatur of the school.

On the day at issue, moreover, Frederick had not set foot on school property. Rather, he drove to the event, parked away from the school and walked several blocks to join the public on the sidewalk. *Id.* at 28-29. School had been in

session earlier that day but Frederick had not attended, because, he claimed, he had been detained by snow in his driveway. *Id.* at 28. The school principal and superintendent, however, both admitted that any possible truancy by Frederick was not the reason for his suspension. Pet. App. 67a. Thus while the school certainly had the authority to punish Frederick for any unexcused absence, it is undisputed that it was his speech—not possible truancy—that led to his suspension. By the time of the torch passing, furthermore, the school had released the students. *Id.* at 2a. The court of appeals found that any supervision of the students by the school at the torch relay was "minimal or non-existent," and the record shows that attendance was neither mandated nor enforced. *Id.* at 5a.

In this case it was the school principal, not Frederick, who crossed the line—both physically and legally—between the school and non-school environment. While Frederick remained on public property at all times, Morse left school grounds, marched across the street, and grabbed Frederick's banner. For this reason, her actions should be analyzed under this Court's precedents regarding content-based restrictions on speech in a public forum.

This analysis is straightforward. Public sidewalks, where Frederick was standing, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939); see also *Carey* v. *Brown*, 447 U.S. 455, 460 (1983) (holding that access to sidewalks "for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely") (quoting *Hudgens* v. *NLRB*, 424 U.S. 507, 515 (1976)); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942) ("This court has unequivocally held that the streets are proper places for the

exercise of the freedom of communicating information and disseminating opinion.").

Furthermore, Petitioners have made it apparent that it was the viewpoint of Frederick's message that led to his punishment. See J.A. 25 (affidavit of Morse) ("During the interview in my office, I told Frederick that I had asked him to drop the banner because I thought the reference to 'bong hits' would be construed as advocating drug use."); *id.* at 17 (Petitioners admitting "Morse stated that she probably would not have seized the banner if it had contained a political statement, including a statement advocating legalizing drug use."); see also Pet. App. 18a (holding by the court of appeals that Petitioners "conceded that the speech in this case was censored only because it conflicted with the school's 'mission' of discouraging drug use"). Therefore, this is a case of viewpoint-based discrimination by the government, which "is ordinarily subject to the most exacting First Amendment scrutiny," *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001). As this Court has explained, "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992); see also *Rosenberger* v. *Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

Petitioners attempt to draw their actions as a mere "time, place or manner" restriction on Frederick's speech. Pet. Br. 31 (arguing that regulating "the time, place, or manner of a student's expressive conduct in no wise [sic] offends the First Amendment"). But because this case involves content-based censorship, this Court has held that "time, place or manner" analysis is inapposite. *Pac. Gas & Elec. Co.* v. *Pub. Util. Comm'n*, 475 U.S. 1, 20 (1986) (holding that "for a time, place, or manner regulation to be

valid, it must be neutral as to the content of the speech"); *Reno* v. *ACLU*, 521 U.S. 844, 879 (1997) (holding that "time, place and manner" analysis is not applicable when statute "regulates speech on the basis of its content"); *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 US. 530, 536 (1980) ("[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech."); see also *Saxe*, 240 F.3d at 209 ("Nor do we believe that the restriction of expressive speech on the basis of its content may be characterized as a mere 'time, place and manner' regulation.").

The facts in this case are simple: A young adult peacefully exercised his freedom of speech at a public event and while on public property. In these circumstances, the Constitution protects him from being punished solely because the government disagrees with the viewpoint of his message. For the same reasons that a school cannot punish a student for the books he reads at home, the art he produces at a community center or the letters to the editor he writes to a newspaper, Frederick's speech is constitutionally protected.

B. Petitioners Cannot Give Themselves Power To Censor Student Speech Simply By Declaring That A Public Or Community Event Has Been "School Sanctioned"

If Frederick and his banner are found to be outside of the school's realm, as argued above, a First Amendment analysis of content-based restrictions is fatal to Petitioners' argument. Petitioners attempt, therefore, to broaden their authority over students so that it includes public property and public events.

They start by insisting that the Olympic Torch Relay—a commercially sponsored, international, public event—was in some way "school-sponsored." See Pet. Br. 33 (stating that

"Frederick's banner was unfurled in the midst of a highly important 'school-sponsored' activity"). This argument conflicts with the facts and this Court's precedents. First, the facts are undisputed that the torch relay was commercially sponsored and not organized, financed, planned or backed by the school. Pet. App. 2a, 10a. It did not carry the name, insignia or other imprimatur of the school in any way. J.A. at 9, 22-23. And it took place on public property. *Id.* at 10, 16.

The constitutional test established by this Court, moreover, is not whether the event or activity was school-sponsored, but whether the *speech* at issue was school-sponsored. Students, for example, "cannot be punished merely for expressing their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours'" unless the school shows that the speech would substantially interfere with the work of the school. *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 512-13 (citations omitted)). And as is discussed further in Part II.C., it is clear that the Olympic Torch Relay does not fall in the category of "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271.

Because the torch relay was clearly not "school-sponsored," Petitioners and their *amici* resort to the more muted and legally meaningless phrase—"school-sanctioned activity." See, e.g., Pet. Br. 31 (contending that Frederick's banner interfered "with a school-sanctioned activity"). But this Court has never used, defined or endorsed the concept of a "school-sanctioned activity" as it relates to student speech rights. Petitioners also fail to define the term. They further cite no legal support for the claim that public schools may "sanction" a community or public event, and they do not explain the limits of this alleged power. This is an overly

broad and vague power grab by Petitioners that has no support in the Constitution or the precedents of this Court.

According to Petitioners' argument, public schools apparently possess the power simply to declare or "sanction" any commercial, private, public or community event they choose. By pronouncing an event to be "school-sanctioned," the school allegedly has invested itself with the authority to suppress, censor and punish speech by any of its students at the event. There appears, moreover, to be no limit to the number or types of events a school can "sanction" and thus confer upon itself censorship powers. It does not matter if the event, as in this case, is commercially sponsored, open to the public, and occurs on public property. It makes no difference if, as in this case, the event does not bear the school's name or insignia. Judging from this case, the school need not require attendance by the students or permission from the students' parents. And the school has no obligation to effectively supervise the students during the event it has "sanctioned." It further appears that the school need not formalize its "sanctioning" through a vote of the school board or by giving notice to the students and parents prior to the event. All that matters, it can be deduced from Petitioners' argument, is that at some point after the event, the school declares it was "sanctioned."

Public schools do not possess the power to "sanction" events. The potential consequences of such authority would be overbroad, unacceptably vague, and in direct contrast to the First Amendment protections recognized by this Court.

C. Petitioners Cannot Determine The Sole Message Of A Commercially Sponsored, Public Event And Then Punish Any Student Speech That Attempts To "Change The Subject" And To Reach A Large Audience

Petitioners' novel view of their power over outside events continues with their argument that they have the authority to determine the sole message or purpose of community events. Any student speaker, they argue, who attempts to divert the audience's attention from the school's "purpose" to the speaker's message is subject to punishment. The infraction is worsened, according to Petitioners, if the student speaker is successful at reaching a large audience.

Petitioners argue that Frederick deserved punishment for his speech because he "changed the subject" and "distract[ed] from the purpose that the Juneau School District sought to serve in sanctioning this event." Pet. Br. 32; see also *id.* at 15 (claiming Frederick's "distracting" banner "radically changed the subject"). They further accuse Frederick of reaching too large of an audience, complaining that he did not express his message "in a classroom or hallway," but rather he waited for the television cameras to unfurl his "*subject-altering* banner for the community (and the world) to see." *Id.* at 33 (emphasis added).

There is, of course, no constitutional exception for "subject-altering" speech. The government "may not select which issues are worth discussing or debating in public facilities." *Carey*, 447 U.S. at 463. The First Amendment, rather, "command[s] that the Government has no power to dictate what topics its citizens may discuss." *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 328 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). While in this case Frederick's rights are equal to those of all United States citizens, students while at school also "may not

be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

The First Amendment's protections of a speaker's rights are also not lessened because he aimed to reach a large audience. Petitioners complain that Frederick directed his speech beyond his fellow students in "a classroom or hallway" and instead focused on the much larger television-watching audience of "the community (and the world)." Pet. Br. 33. The freedom of speech, however, guarantees the right to "reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949). Furthermore, this Court has noted that other than in limited circumstances, students also enjoy "the otherwise absolute interest of the speaker in reaching an unlimited audience." *Fraser*, 478 U.S. at 684.

Not only does this objection by Petitioners to Frederick's speech have no constitutional basis, it also undermines their position that it was concern for their students—rather than a concern for public relations—that motivated their punishment of Frederick. It seems Petitioners would have preferred it if Frederick had kept his speech to "a classroom or hallway" with an all-student audience rather than have him speak to the general public via national and international television coverage.

This is a case about an adult United States citizen who chose to speak peacefully at a commercially sponsored, community event while on a public sidewalk. Petitioners did not have the authority to censor him or to punish him for his speech. It does not matter that they disagreed with the perceived viewpoint of his message. It does not matter if his message "changed the subject" and reached a large audience. And it does not matter that they "sanctioned" the event.

II. EVEN IF RESPONDENT'S SPEECH IS DEEMED TO BE SCHOOL SPEECH, PETITIONERS' ACTIONS WERE UNCONSTITUTIONAL UNDER CLEARLY ESTABLISHED LAW

Although Frederick's independent speech took place entirely off-campus and at a public event, Petitioners argue that this case should be analyzed as a school speech case. As the court of appeals found, however, even under this Court's student speech cases Petitioners' censorship of Frederick was unconstitutional under clearly established law.

This Court has decided three important cases regarding student speech at public secondary schools: *Tinker*, 393 U.S. 503 (finding school censorship of non-disruptive student expression while at school to be unconstitutional); *Fraser*, 478 U.S. 675 (upholding a school's punishment of a student who used lewd and vulgar language during a school assembly); and *Hazelwood*, 484 U.S. 260 (holding that schools may regulate some "school-sponsored" speech).

It is unclear from Petitioners' brief which of these decisions—*Tinker*, *Fraser* or *Hazelwood*—they submit controls this case. Rather, they conflate the three and argue that the school's censorship of Frederick "fits comfortably within the framework of the school speech trilogy." Pet. Br. 25. Closer analysis, however, establishes that Petitioners did not have the constitutional authority under this Court's precedents to censor Frederick because his speech was not substantially disruptive, lewd or vulgar, or school-sponsored.

A. Petitioners' Censorship of Respondent's Speech Was Unconstitutional Under *Tinker*

Almost forty years after this Court handed down the decision, *Tinker* remains the dispositive statement on the constitutional protections of independent student speech at school. It was in *Tinker* that this Court famously held that

students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506. While this Court has addressed narrow issues related to student speech since *Tinker*, it has never retreated from this basic principle.

1. Petitioners' actions were unconstitutional because Respondent's speech did not materially or substantially disrupt school activities.

In *Tinker* this Court solidified the significant First Amendment rights of students, but it also recognized the need for school officials "to prescribe and control conduct in the schools." 393 U.S. at 507. This Court resolved these sometimes-conflicting interests by holding that school officials may prohibit some student speech at school if they can show that "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509 (quotation omitted); see also *Saxe*, 240 F.3d at 212 (stating that under *Tinker*, a restriction on student speech will be upheld only "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech").

At the same time, however, this Court rejected the notion that schools may censor student speech based purely on "undifferentiated fear or apprehension of disturbance." *Tinker*, 393 U.S. at 508. Similarly, school officials may not confine speech "to the expression of those sentiments that are officially approved" in order "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

Tinker involved a school's attempt to prohibit students from wearing black armbands in protest of the conflict in Vietnam. In this case, as in *Tinker*, "the record does not

demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbance or disorders on the school premises in fact occurred." *Id.* at 514. In fact, the Juneau School Board admitted that Frederick's speech resulted in no disruption to school operations at all—let alone created a "material and substantial" interference. Pet. Br. 6a; J.A. 108.

2. Respondent did not lose his free speech rights under *Tinker* simply because Petitioners concluded that his speech was not overtly "political."

Petitioners attempt to distinguish this case by suggesting that *Tinker* protects only political speech and that Frederick's speech was not political. See, e.g., Pet. Br. 15 (arguing that Frederick's speech "lay far outside the province of *Tinker*-protected political expression"). Their argument hinges on an unsupported view of *Tinker* and their questionable interpretation of Frederick's message.

This Court has declared that the "guarantees for speech and press are not the preserve of political expression." *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). Nothing in *Tinker*, moreover, suggests that students' First Amendment rights extend only to "political" speech. Rather, as then-Judge Alito writing for the Third Circuit, recently explained: "Speech falling outside of [the *Hazelwood* and *Fraser*] categories is subject to *Tinker*'s general rule: It may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214. In other words, *Tinker* functions as the catchall for student speech at school that has not been established to be either school-sponsored or lewd and vulgar. It is not exclusive to political speech. The student speech may be artistic, religious, scientific, commercial, provocative, humorous, or ambiguous and still fall under *Tinker*'s protective umbrella.

This Court, moreover, has never offered a definition of what is or is not "political" speech. Legal commentators likewise have not reached a consensus on this issue. Professor Erwin Chemerinsky, for example, has discussed the struggle to define political speech and noted, "[v]irtually everything from comic strips to commercial advertisements to even pornography can have a political dimension." Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 897 (2002).[4]

While the definition of "political" speech has perplexed courts and legal commentators for decades, Petitioners allege certainty. Although they admit that Frederick's banner was "ambiguous," Pet. Br. 15, they nonetheless insist that his message advocated illegal drug use and was not political. See *id.* at 30 (referring to banner as "pro-drug"); *id.* at 25 (distinguishing *Tinker* because Frederick's speech did not involve "the passive expression of political viewpoint").

The true meaning of Frederick's cryptic message—if there is a true meaning—is certainly debatable. But it is not as obvious as Petitioners suggest that Frederick's message was pro-drug or not political. According to Frederick, he held up the banner to make a statement about First Amendment freedoms. As he explained:

> I had been disappointed in my civil rights at the school. . . . [School officials] didn't feel that they had to give students rights when they actually do. And everywhere it seems like people don't realize how important, like, our—like the First Amendment is. We wanted to just, like, say something like . . . how should I say this? Like, I

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[4] See also Paul Finkelman, Book Review, *Cultural Speech and Political Speech in Historical Perspective*, 79 BOSTON U.L. REV. 717, 720 (1999) (observing that speech about cultural issues "may at the same time address political issues").

> figured that if people didn't think we should be allowed to do that, then we weren't in America anymore. It's changing.

J.A. 66. Frederick, in fact, has a history of taking a stand for his convictions on civil liberties. Earlier that school year, for example, Frederick claims he was threatened with punishment for refusing to stand for the Pledge of Allegiance. While he was not suspended, a report was created about the incident. *Id.* at 64; cf. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) (holding it violated the First Amendment to force students to salute the American flag).

While Frederick stated that his reason for holding up a banner was to make a statement about free speech, he claimed the message itself was chosen to be humorous and to grab the attention of the television cameras. He stated that he and his friends wanted a message "that could be controversial or funny or whatever you wanted it to be, or nothing if you don't." J.A. 66. But, he admitted, it needed to be provocative enough "to where you are testing something." *Id.* Frederick explained that "[i]f we held up a banner that said 'Hi,' or 'Hello,' ... that's not really testing free speech at all." *Id.* The message, he said, could not be one where "of course they would let us do it." *Id.* at 69.

Adding the phrase "bong hits" to another phrase "4 Jesus" was "somewhat ironic," Frederick said. *Id.* at 66. But he "didn't expect people to see it as advocating drugs." *Id.* at 70. "I don't see how it's advocating anything," he stated. *Id.* Frederick stressed repeatedly that the words on the banner itself were secondary to his statement about First Amendment freedoms. *Id.* at 69. "I could have used another phrase and still been going for the same message," he explained. "I was trying to assert my right to free speech." *Id.* at 68-69. Another time Frederick stated, "[w]e thought we

had a free speech right to display a humorous saying, and that's all we were doing. The content of the banner was less important to us than the fact that we were exercising our free speech rights to do a funny parody." *Id.* at 28.

Frederick was consistent from the beginning that his purpose was to make a statement about his freedom of speech—not to advocate drug use. From the moment Morse confronted him, Frederick responded by asking about his First Amendment rights. *Id.* at 10, 25. Later, in Morse's office, Frederick again protested his suspension by asking about his civil liberties. *Id.* at 30. At the hearing before the superintendent of schools, Frederick stated that his banner was not intended to advocate drug use but rather to exercise his First Amendment rights. *Id.* at 11, 17. Throughout his affidavits and depositions in this case, Frederick has maintained that his intent was to assert his freedom of speech and not to advocate drug use.

Notably none of the students represented in the record interpreted Frederick's banner as promoting illegal drug use; at most, they seemed baffled at the meaning. See *id.* at 33 (declaration of Madsen) ("I didn't think the message on the banner promoted illegal drug use. I'm not sure what it meant, but I didn't think it was suggesting drug use."); *id.* at 34 (declaration of Field) ("I don't know any students who took it to have a drug meaning."); *id.* at 37 (declaration of M. Croteau) ("I am not sure what Joe meant by the saying on the banner. ... [N]o one took it seriously as saying anything about drugs."); *id.* at 39 (affidavit of S. Croteau) ("None of us really knew what he meant by the banner.").

Frederick might be guilty of not being a particularly effective communicator, but it is far from clear that he intended to advocate drug use. And Petitioners offer no evidence to doubt him. Accepting Frederick's explanation, he was indeed engaged in political expression because

"expression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." *Texas* v. *Johnson*, 491 U.S. 397, 411 (1980).

In discussing the impact of the *Tinker* decision, the Fourth Circuit Court of Appeals explained that a "student's freedom to express peaceful dissent on campus is more than a privilege; *Tinker* tells us that it is a basic right guaranteed by the first amendment." *Saunders* v. *Va. Polytechnic Inst.*, 417 F.2d 1127, 1130 (4th Cir. 1969). Petitioners violated that basic right when they suppressed Frederick's speech and punished him for exercising his constitutional rights.

B. Petitioners' Censorship of Frederick's Speech Was Unconstitutional Under *Fraser*

1. Petitioners violated the First Amendment because Frederick's speech was not "offensively lewd and indecent."

While it is not entirely apparent which of this Court's decisions Petitioners submit controls in this case, it seems they rely most heavily on *Fraser*. See Pet. Br. 33 (stating that *Fraser* "closely fits the facts at hand"). *Fraser*, however, does not apply to Petitioners' censorship of Frederick, because that decision "rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly." *Hazelwood*, 484 U.S. at 272, n. 4 (citations omitted).

In *Fraser*, the Court upheld the school's suppression of a student's speech during a school-sponsored assembly that was "offensively lewd and indecent," *Fraser*, 478 U.S. at 685, and included "pervasive sexual innuendo" and "vulgar and offensive terms," *id.* at 683. The focus of this Court's decision in *Fraser* was on the sexual vulgarity of the student's speech during a school assembly. *Id.* at 680. This Court stated that schools could limit "the otherwise absolute

interest of the speaker in reaching an unlimited audience [if] the speech is sexually explicit and the audience may include children." *Id.* at 684.

The courts of appeals, moreover, have consistently interpreted *Fraser* as applying to sexual content. Recently the Second Circuit concluded that images of drugs and alcohol on a student's t-shirt were not "plainly offensive" under *Fraser*. *Guiles* v. *Marineau*, 461 F.3d 320, 328 (2d Cir. 2006); see also *Saxe*, 240 F.3d at 213 ("*Fraser* permits a school to prohibit words that 'offend for the same reason vulgarity offends.'"); *LaVine* v. *Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (concluding a student poem was not "vulgar, lewd, obscene or plainly offensive" under *Fraser* because it was not "an elaborate, graphic, and explicit sexual metaphor as was the student's speech in *Fraser*, nor does it contain the infamous seven words that cannot be said on the public airwaves") (quotation omitted).

None of the words on Frederick's banner meets this standard. The only way in which Frederick's message could be deemed "offensive" would be because the message itself expressed a viewpoint with which others might disagree and find controversial—not because it is vulgar and indecent in the sense the Court described in *Fraser*.

2. Petitioners cannot suppress student speech solely because it is controversial or contrary to the school's "message."

Independent student speech may not be censored merely for its controversial message. This Court in *Fraser* noted that the role of schools must include "a tolerance of divergent political and religious views, even when the views expressed may be unpopular." 478 U.S. at 681. As the Fifth Circuit explained, "it should be axiomatic at this point in our nation's history that in a democracy 'controversy' is, as a matter of constitutional law, never sufficient in and of itself

to stifle the views of any citizen." *Shanley* v. *Northeast Indep. Sch. Dist.*, 462 F.2d 960, 971 (5th Cir. 1972) (holding school's suppression of an underground student newspaper was unconstitutional).

Petitioners in this case, however, argue that students' free speech rights must give way whenever their speech is perceived to be interfering with the school's "drug-free-lifestyle message." Pet. Br. 27. This argument has been rejected by the courts of appeals. The Second Circuit, for example, recently refuted the argument that a school may censor all images of drugs and alcohol "because they undermine the school's anti-drug message." The Second Circuit explained the phrase "plainly offensive" can not be

> so broad as to be triggered whenever a school decides a student's expression conflicts with its "educational mission" or claims a legitimate pedagogical concern. . . . [I]f schools were allowed to censor on such a wide-ranging basis, then *Tinker* would no longer have any effect.

Guiles, 461 F.3d at 330. Similarly, the Fourth Circuit also rejected a public school's argument that it could ban all images of weapons by students because it conflicted with the school's message that "'Guns and School Don't Mix.'" *Newsom* v. *Albemarle County Sch. Bd.*, 354 F.3d 249, 260-261 & n.10 (4th Cir. 2003) (applying *Tinker* and finding that because there was no evidence of a substantial disruption of school operations, the district court erred in denying the student a preliminary injunction against the school).

The court of appeals in this case also rejected Petitioners' argument that an alleged conflict with the school's "educational mission" gives the school free reign to censor student speech. The court of appeals stated:

> All sort of missions are undermined by legitimate and protected speech—a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime*; a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers.

Pet. App. 11a.

In this case the Juneau School Board disagreed with the topic and alleged viewpoint of Frederick's chosen speech. The message itself, however, was not "offensively lewd and indecent" or "plainly offensive" as *Fraser* describes and thus the decision is inapplicable.

C. Petitioners' Censorship of Frederick's Speech Was Unconstitutional Under *Hazelwood*

1. This case does not fall under *Hazelwood* because Respondent's speech was not school-sponsored.

Almost twenty years after deciding *Tinker*, this Court addressed the related, but distinct, issue of school-sponsored student speech in *Hazelwood*. The facts in *Hazelwood* involved the ability of high school officials to remove articles from the school-sponsored student newspaper regarding teen-age pregnancy and divorce. This Court reaffirmed the important constitutional protections of *Tinker*, 484 U.S. at 266, but then went on to address "when a school may refuse to lend its name and resources to the dissemination of student expression" in a non-public forum. *Id.* at 272-73.

This Court thus created two distinct categories of student speech. The first includes "a student's personal expression that happens to occur on the school premises"

while the second covered "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. This latter category, the Court explained, included activities that "may fairly be characterized as part of the school classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* This Court in *Hazelwood* held that speech in the first category—speech that was not part of a school-sponsored activity and not "disseminated under [the] auspices" of the school—was entitled to a high level of First Amendment protection. 484 U.S. at 271-72.

Frederick's speech in this case was clearly not school-sponsored under *Hazelwood*. The school did not supply any of the resources involved in the making or display of his banner. And Frederick's speech was not overseen by a faculty member who exercised "a great deal of control" and was the "final authority" on the speech. *Id.* at 268. Similarly, the banner was not produced in connection with a class or school project and Frederick did not receive a grade or credit for the speech. The speech also occurred off-campus during a public event. In other words, the school did not "lend its name and resources to the dissemination of [the] student expression," *id.* at 272, and the speech was not "disseminated under [the] auspices" of the school, *id.* For these reasons, no reasonable observer could conclude that the school had somehow endorsed Frederick's message on the banner.

Contrary to Petitioners' argument, the question before this Court is not whether the school allowed student attendance at a public event, but rather whether there was school sponsorship of the student's *speech*. The limitations of *Hazelwood* apply only when the student speaker occupies a platform that has been provided and sponsored by the school.

Yet under Petitioners' reasoning, any student speech that occurs over lunch, at a football game, during after-school play practice, or wherever the school might allow students to go would be fair game for censorship. (Petitioners would also include any private, public or community event that the school has "sanctioned.") This is in direct violation of this Court's mandate that students cannot be punished for non-disruptive independent speech whether it occurs "in the cafeteria, or on the playing field, or on the campus during the authorized hours." *Tinker*, 393 U.S. at 512-13.

2. Petitioners may not censor Respondent based on a fear that others will infer that the school endorses any speech it fails to censor.

Petitioners contend that Morse had a "responsibility to 'disassociate' the school from the banner" because if she "had been insouciantly indifferent to Frederick's drug-related banner, many in the community might well have wondered what they are teaching at taxpayer-supported Juneau-Douglas High School." Pet. Br. 33. This argument—that by failing to censor student speech, school administrators were putting their seal of approval on it—has been repeatedly rejected by this Court and many lower courts.

As this Court has explained, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality). Rather, this Court has held that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id*; accord *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 126 S.Ct. 1297, 1307 (2006) (holding that by accommodating military recruiters on campus, law schools would not be "viewed as sending the message that they see nothing wrong with the military's

policies, when they do"); *Rosenberger*, 515 U.S. at 841 (holding that concern that student message would be attributed to the school was "not a plausible fear").

Here, Petitioners appear more concerned that members of the general public—as opposed to their students—would believe the school was endorsing Frederick's message by failing to censor it. See Pet. Br. 33 (referring to what "many in the community" might be thinking and complaining that Frederick's banner was on television "for the community (and the world) to see"). This makes their argument weaker. Courts already accept that secondary school students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," *Rumsfeld*, 126 S.Ct. at 1310, thus the proposition that adults possess this ability is even stronger. See, e.g., *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980) (finding that the public would not attribute to a shopping center owner the expressive views of others who are allowed to speak on the property).

Courts have held that in an effort to avoid the appearance of school sponsorship of a student's speech, a school may not "throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship." *Hedges* v. *Wauconda Cmty. Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993); accord *Saxe*, 240 F.3d at 214. Rather, as the Seventh Circuit explained, "[t]he school's proper response is to educate the audience rather than squelch the speaker." *Id.*; see also *Burch* v. *Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988) (finding that an underground newspaper distributed on school grounds at a school picnic could not reasonably be viewed as school-sponsored); *Rivera* v. *East Otero Sch. Dist.*, 721 F. Supp. 1189, 1194 (D. Colo. 1989) (holding that a school "cannot completely muzzle the students to save itself the difficulty of determining which speech it may constitutionally proscribe"). Instead the school must err on the

side of allowing the student speech to flow freely and suppress it only after meeting strict and established limitations.

This is a case about the Juneau School District suppressing Frederick's "personal expression that happen[ed] to occur" during school hours. *Hazelwood*, 484 U.S. at 271. Even if the Court accepts that Frederick's off-campus speech constitutes campus expression, because it "was voluntary, student-initiated, and free from the imprimatur of school involvement[,] *Tinker* provides the standard." *Clark* v. *Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992). The mere fact that the Olympic relay occurred during school hours and that students were allowed to leave their classes to watch the event did not convert Frederick's independent speech at that public event into school-sponsored speech.

III. PROTECTING STUDENTS' CONSTITUTIONAL RIGHTS TO FREE SPEECH IS FUNDAMENTAL TO THEIR EDUCATION ON CITIZENSHIP

Robust independent student speech is fundamental in a democratic society. Not only is it constitutionally safeguarded, but it also provides students with a powerful and vital civics lesson.[5] This Court has stated repeatedly that the fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637; see also *Shanley*, 462 F.2d at 972 ("It is most important that our

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[5] Recent research suggests First Amendment appreciation by high school students is severely lacking. In a 2006 nation-wide survey, high school students were asked whether "[t]he First Amendment goes too far in the rights it guarantees." Forty-five percent of the students agreed with that statement and 19 percent had no opinion. John S. and James L. Knight Foundation, *Future of the First Amendment: 2006 Follow-Up Survey*, http://www.firstamendmentfuture.org/report91806_student.php.

young become convinced that our Constitution is a living reality, not parchment preserved under glass.").

If accepted, Petitioners' wide-sweeping view of school power over independent, off-campus student speech has the potential to chill all types of student expression. It could be used to justify punishment of a student for attending a public rally against illegal immigration that school officials deem "insensitive" or for writing a letter to the editor of a community newspaper condemning gay marriage that the school decides is "intolerant." A student distributing leaflets in the public park urging the legalization of marijuana for medical purposes could find himself subject to punishment as could a student who wears an athletic jersey with a beer company logo on a weekend trip to the supermarket with his parents. This result contradicts this Court's holdings in *Tinker* that "[u]nder our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." 393 U.S. at 513.

The question of constitutional protections for independent student speech should not be seen as a battle between students on one side and school administrators on the other. Instead the goal should be a diverse and respectful environment of free expression. As former Justice Clark, sitting by designation on the Fourth Circuit, explained: "We have both compassion and understanding of the difficulties facing school administrators, but we cannot permit those conditions to suppress the First Amendment rights of individual students." *Nitzberg* v. *Parks*, 525 F.2d 378, 384 (4th Cir. 1975).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

DEBORAH MORSE;
JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON BEHALF OF STUDENTS FOR SENSIBLE DRUG POLICY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF ON BEHALF OF STUDENTS FOR SENSIBLE DRUG POLICY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Students for Sensible Drug Policy respectfully submits this brief as *amicus curiae* in support of Respondent.

INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[1]

Students for Sensible Drug Policy ("SSDP") is a non-profit, public interest advocacy organization comprising a grassroots network of students who are concerned about the impact drug abuse has on our communities and who believe that our current drug policies are failing young people. Founded in 1998, SSDP has thousands of student members in chapters at over 100 colleges and high schools throughout North America. SSDP helps empower young people to participate in the political process, educates young people about drug policy issues, and advocates for policies that treat drug abuse as a public health issue, not just a criminal justice issue. SSDP believes that protecting the rights of students to freely discuss drug policy and drug abuse issues, particularly in an academic setting, is essential to finding solutions to the problem of drug abuse.

All students – not just SSDP's members – should be able to freely and openly discuss drug policy and drug abuse issues on their campuses. But the Draconian legal standard Petitioners propose would allow school officials to punish student speech concerning a wide range of legitimate policy questions, from medicinal marijuana initiatives to student drug testing. SSDP files this brief to highlight the important perspective students bring to the drug policy debate and to demonstrate the harmful impact

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[1] Pursuant to Rule 37.6, *amicus curiae* Students for Sensible Drug Policy states that no counsel for a party authored this brief in whole or in part. No person or entity other than Students for Sensible Drug Policy or its counsel made a monetary contribution to the preparation or submission of the brief.

that reversal of the decision below would have on students' ability to discuss important drug policy and drug abuse issues.

SUMMARY OF ARGUMENT

Our nation's drug policies directly and intimately affect students' daily lives. Whether it be random drug testing for student athletes or federal financial aid conditioned on lack of any drug conviction, young people are significantly affected in their positions as students by drug-related policies. Students thus have a vested interest in understanding and discussing the underlying issues that guide and affect this country's drug policies. The First Amendment guarantees that their voice on these issues be protected.

Petitioners ask this Court to give school administrators a sizable net to cast over and suppress student speech about drug policy. Yet, such broad powers would not help solve the intractable problem of drug abuse. Indeed, the opposite is true: this country would not be able to evaluate the success of its drug policies without allowing the people most directly affected by those policies to freely discuss and debate them without fear of reprisal. The far-reaching authority sought by Petitioners would prevent students from engaging in legitimate political dialogue relating to heavily debated political issues.

Moreover, allowing school administrators to punish students based only on a subjective view that the speech is "inconsistent" with a school's mission statement would have a similar effect. Under the proposed standard, for example, a student would not be able to freely discuss any drug testing policy adopted at his or her own school for fear that a critical comment could result in punishment for allegedly undermining the school's anti-drug mission.

Petitioners' proposed drug exception to student speech is not, and should not be, the law. Students should enjoy the same First Amendment right to freely speak about issues of drug policy and drug abuse as they have to speak about any other political or public health issue. If

anything, student speech about issues that directly and intimately affect them – like drug policy – is deserving of even more rigid protection. Schools should be allowed to punish student speech only if it seriously disrupts the educational environment or clearly and unambiguously encourages illegal activity.

Contrary to *amici* D.A.R.E.'s assertions,[2] policy considerations do not justify silencing students on the important issues of drug policy and drug abuse by treating speech that mentions drugs differently from other speech. D.A.R.E. claims that the Ninth Circuit's decision would "threaten to make vital anti-drug policies unenforceable." But the studies they cite do not support this claim. Rather, government reviews have shown that two of these purportedly "vital policies" – the National Youth Anti-Drug Media Campaign and the D.A.R.E. program itself – are ineffective at reducing drug use among minors.

Permitting a school to punish the speech at issue in this case would impede, if not extinguish, legitimate debate about drug policy in public schools. Respondent's ambiguous and nonsensical statement could be interpreted as an attempt at a sarcastic political commentary about religion just as easily as – or perhaps even more easily than – it could be interpreted, as Petitioners would have it, as an endorsement of illegal drug use. It could equally be viewed as an attempt to obtain the spotlight during a highly-publicized event, as Respondent testified. Yet, Petitioners did not punish Respondent because they believed his banner was disruptive, but because they did not like the banner's content. If schools can punish this sort of vague and ambiguous speech because it may be interpreted by some as referring to a controlled substance

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[2] Brief for D.A.R.E. America, Drug Free America Foundation, Inc., National Families in Action, Save Our Society from Drugs, Hon. William J. Bennett, and General Barry R. McCaffrey as *Amici Curiae* in Support of Petitioners, filed Jan. 16, 2007 ("D.A.R.E. *Amici* Br."). The parties to the D.A.R.E. *Amici* Brief are collectively referred to as "D.A.R.E." or "*amici* D.A.R.E."

in a positive light, it will unconstitutionally chill student speech about drug policy issues.

ARGUMENT

I. STUDENTS HAVE A CONSTITUTIONAL RIGHT TO DISCUSS ISSUES RELATING TO DRUG POLICIES, ESPECIALLY BECAUSE DRUG POLICIES DIRECTLY AFFECT THEIR DAILY LIVES AND THUS RELATE TO SOME OF THEIR CORE POLITICAL CONCERNS.

A. Drug Policies Affect Students From Elementary School Through College.

The government's war on drugs has a more direct and intimate effect on students' daily lives than perhaps any other national policy issue. Petitioners and their *amici* are naïve to believe that they can shield students from a national conversation that takes place in both our schools and our homes.

During a school day, the average student is affected by a wide range of drug policies. Beginning in elementary school, children in 80% of all public school districts are taught about controlled substances through the strict, zero-tolerance approach of the D.A.R.E. program.[3] As *amici* D.A.R.E. observe, preventing drug abuse is "embodied in concrete policies in place at most schools and in federal anti-drug and educational funding laws that shape school curricula." D.A.R.E. *Amici* Br. at 21. Nearly one quarter of high school students are given drug tests in their schools[4] – in fact, annual federal funding for student

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[3] Marjorie E. Kanof, et al., *Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs*, U.S. General Accounting Office Report, Jan. 15, 2003, at 4, *available at* http://www.gao.gov/new.items/d03172r.pdf.

[4] Ryoko Yamaguchi, et al., *Drug Testing in Schools: Policies, Practices, and Association with Student Drug Use*, Youth, Education & Society Occasional Paper 2, Inst. for Social Research, Univ. of Mich.,

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drug testing has increased five times since 2004, from approximately $2 million to $10 million.[5] Students are inundated with millions of dollars worth of government advertising about drugs each year – over $1 billion total since 1998.[6] After graduation, students who have suffered from drug abuse problems and hope to turn their lives around by going to college may be denied federal financial aid if they are convicted of a controlled substance offense. 20 U.S.C. § 1091(r) (2006).[7]

Some schools go beyond these common measures and employ more severe tactics, which they claim are geared towards drug prevention. In Goose Creek, South Carolina, for example, armed police officers stormed a public high school shortly before the start of the school day and, at gunpoint, ordered the students to the floor in order to conduct a drug search.[8] The principal requested the raid based on suspicions cast by a few students and teachers, and some surveillance videos showing nothing more than "students congregating under cameras, periodically walking into a bathroom with different students and

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2003, at 24, *available at* http://www.rwjf.org/files/research/YESOccPaper2.pdf.

[5] *School-Based Drug Testing Programs, Findings Status*, U.S. Dep't of Educ., 2006, *available at* http://www.ed.gov/programs/drugtesting/funding.html.

[6] *Making Further Continuing Appropriations for the Fiscal Year 2003 and Other Purposes*, Conference Report to H.J. Res. 2, 108th Cong., Feb. 13, 2003, at 1345, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr010.108.pdf.

[7] *See also* Katie Heinz, *Study: Drug Use Can Hurt College Financial Aid*, Waterloo/Cedar Falls Courier, May 1, 2006, *available at* http://www.wcfcourier.com/articles/2006/05/01/news/metro/c6d6ac7a21a1838686257161004dce0a.txt (reporting that nearly 200,000 students have been denied federal financial aid because of a drug conviction since the 2000-2001 school year).

[8] Mark Sage, *Armed Police Storm School in Drugs Raid*, The Press Ass'n, Nov. 7, 2003, at Home News.

coming out moments later."[9] Despite a thorough search involving drug-sniffing dogs, no drugs were found.[10] Similarly, zero-tolerance policies have led to severe punishment for trivial and even mythical offenses. Schools have suspended students or turned them over to police for possessing ordinary items that school officials said looked like or "imitated" drugs, such as a bag of dirt that officials said looked like marijuana[11] or a mixture of sugar and Kool-Aid that officials said "imitat[ed] drug activity."[12]

Students are also deeply affected by drug policies outside of school. Mandatory minimum drug sentencing laws, for example, have a significant impact on the children of offenders who are forced to grow up without one or both parents. Indeed, 67% of incarcerated parents – and 74% of incarcerated mothers – at the federal level are in prison due to a drug offense.[13] Young people similarly are affected by a provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which subjects persons convicted of a state or federal felony drug offense to a lifetime ban on receiving cash assistance and food stamps. Some students may become homeless when

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[9] Seanna Adcox, *Police Fail to Find Drugs in Stratford High Raid*, The Post and Courier, Nov. 7, 2003, at 1B.

[10] *Id.*

[11] Tony Hensley, *First Grader Punished for Bag of Dirt*, Heartland News (KFVS12), *available at* http://www.kfvs12.com/Global/story.asp?S=2919630.

[12] Tim Grant, *Pupils Trading Sweet Mix Get Sour Shot of Discipline*, Pittsburgh Post-Gazette, May 18, 2006, at B1; *see also, e.g.*, Justina Wang, *Schoolboy Charged with Felony for Carrying Powdered Sugar*, Chicago Sun Times, Feb. 11, 2006, at 29.

[13] Christopher J. Mumola, *Incarcerated Parents and Their Children*, U.S. Dep't of Justice, Office of Justice Programs, Aug. 2000, at 6, http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf; *see also* Shimica Gaskins, Note: *"Women of Circumstance" – The Effects of Mandatory Minimum Drug Sentencing on Women Minimally Involved in Drug Crimes*, 41 Am. Crim. L. Rev. 1533, 1550 (2004) ("In the end, the harsh consequences of mandatory minimums are mostly felt by the children [of incarcerated mothers.]").

family members run afoul of this one-strike policy that permits public housing agencies to evict entire families if one member of the family engages in drug activity. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002) (holding that the statute gives "local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity").

B. Students Are Often A Focal Point Of The National Drug Policy Debate.

In addition to policies that directly affect students, young people regularly find themselves at the center of the drug policy debate as the principal justification for executive and legislative action. President Reagan, for example, famously declared a "war on drugs" with the chief goal to protect young people from the dangers of drug abuse.[14] All three subsequent presidential administrations have similarly emphasized protecting young people as a central focus of their overall controlled substance strategies.[15] And members of Congress have advanced a

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[14] *See, e.g.*, *Transcript of President's State of the Union Message to the Nation*, The New York Times, Jan. 26, 1983, at A14 ("This Administration hereby declares an all-out war on bigtime organized crime and the drug racketeers who are poisoning our young people.").

[15] *See, e.g.*, Leon Harris and Daryn Kagan, *President Bush Nominates John Walters as Drug Policy Director*, Cable News Network (CNN), May 10, 2001, at Domestic (Transcript No. 01051001v54) (John Walters began his address after being nominated for the position of Drug Policy Director by stating, "[w]e will especially protect our children from drug use."); *Transcript of Presidential Radio Address to the Nation*, U.S. Newswire, Dec. 20, 1997 (President Clinton discussed his administration's "efforts to protect our children from drugs – the most dangerous enemy of childhood."); *Text of President's Speech on National Drug Control Strategy*, The New York Times, Sept. 6, 1989, at B6 (stating that the war on drugs must be won because "too many young lives are at stake").

wide range of specific drug policy measures, from the controversial mandatory minimum sentencing laws[16] to a law that subjects business owners of concert venues to criminal penalties based on drug violations by their patrons,[17] all in the name of young people. Moreover, Petitioners' *amicus* General Barry R. McCaffrey, as director of the Office of National Drug Control Policy ("ONDCP"), argued against state medicinal marijuana initiatives because he believed they "threaten[ed] to undermine efforts to protect our children from dangerous psychoactive drugs."[18]

C. Because Students Often Are At The Center Of Government Efforts To Prevent Drug Abuse, Their Constitutionally Protected Right Of Speech Is Of Particular Importance On Issues Relating To Drug Policy.

Because students have been thrust into the center of our nation's drug policy debate, their constitutional right to participate in that debate should be embraced and protected, not stifled. Students have a constitutionally protected interest in being able to freely share their views on drug policy issues. And those who are substantively involved in making drug policy should seek out these student views. After all, how can we accurately evaluate

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[16] Senator Orrin Hatch, ranking Republican Member of the Judiciary Committee, explained that "the reason why we went to mandatory minimums is because of these soft-on-crime judges . . . who just will not get tough on crime, get tough especially on pushers of drugs that are killing our youth." *Transcript*, PBS Frontline, Jan. 12, 1999, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/script.html.

[17] Nick Anderson, *Rave Crackdown Targets Drugs, Not Music, Biden Says*, The Los Angeles Times, April 17, 2003, at Part 1, 22 (Senator Biden, the sponsor of the measure, said he was "only trying to deter illicit drug use and protect kids.").

[18] *Prepared Statement of General Barry R. McCaffrey, Director of National Drug Control Policy, Before the Senate Judiciary Committee*, Federal News Service, Dec. 2, 1996.

the success of our drug policies without allowing the people most directly affected to freely discuss and debate them? If anything, student speech about drug policy is deserving of even more careful and robust protection than other student speech because of the unique perspective and insights young people have on these national issues and because of the impact these policies have on them. As the 1990 National Commission on Drug-Free Schools explained: "[b]ecause any effort to eliminate drug problems must have the cooperation and support of young people, and because drugs have had such a significant impact on them, the Commission has given students' views much consideration in its findings and recommendations."[19] *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) ("The government's approach to th[e] problem [of drug abuse] is . . . a matter of great importance [and] criticism of the federal government's national drug control policy – even to the extent of advocating the legalization of certain drugs – implicates matters of public concern.").

D. Student Speech Relating To Drug Policy Should Be Protected Because Students Offer An Invaluable Perspective Regarding How To Curb Drug Abuse.

Students often experience disproportionate pain in seeing family members, friends, and classmates suffer from drug abuse. Accordingly, students – as much as other groups – appreciate the need for policies that will reduce

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[19] *Toward a Drug-Free Generation: A Nation's Responsibility, Final Report*, Nat'l Comm'n on Drug-Free Schools, U.S. Dep't of Educ., Sept. 1990, at 13.

the harmful impact that drug abuse and addiction have on our communities. As is true among the general public, however, there is disagreement among students about the best way to address the drug abuse problem and the effectiveness of our current approach. Drug abuse has remained an intractable problem – as *amici* D.A.R.E. correctly observe – *despite* the fact that we have spent over $78 billion for federal drug enforcement efforts since 2000 alone[20] and, as of 2003, over 325,000 people were incarcerated in state or federal prisons for drug offenses.[21]

Many students believe that the very real harms of drug abuse are not adequately addressed by current policies and that a new approach is needed. Students with this viewpoint should not be subjected to, nor should they fear, punishment by school officials for expressing their opinions about drug policy, particularly in an academic setting. *Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673, 675 (9th Cir. 1971) (Students have the "right to freely express themselves upon those issues which concern them.").

Indeed, SSDP has found that encouraging among young people a free and open dialogue about drug policy not only is an essential part of a healthy and legitimate debate about the policies themselves, but also promotes a broader civic engagement among students. Last spring, for example, members of the Chicago-based Francis W. Parker High School chapter of Students for Sensible Drug Policy organized a trip to a national summit on student drug testing in Wisconsin.[22] And in 2004, because of her active

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[20] *National Drug Control Strategy: FY 2007 Budget Summary*, The White House, 2006, at 9, http://www.whitehousedrugpolicy.gov/publications/policy/07budget/budget07.pdf.

[21] Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, U.S. Dep't of Justice, Bureau of Justice Statistics, Nov. 2006, at 9-10, http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

[22] *See* Jamaal Abdul-Alim, *Official Touts School Drug Tests: But Local Critics Call Random Screenings Costly, Ineffective*, The Milwaukee Journal Sentinel, April 26, 2006, at B3 ("Marissa Venturi . . . a member of Students for Sensible Drug Policy . . . called random

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work on the issue in her school, Amanda Gelender – a public high school student and SSDP member – testified before the California state senate during hearings on a drug-testing bill.[23]

Whatever one thinks about the merits of these students' views on drug testing, their engagement provides an invaluable contribution to the drug policy discussion, as well as to the educational process. By joining the public discussion about issues that affect them, students have the opportunity to experience in the real world the lessons about which they read in high school civics classes – experiences that may very well keep them interested and involved in our country's democratic process. *See Shanley v. N.E. Indep. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 972 (5th Cir. 1972) ("One of the great concerns of our time is that our young people, disillusioned by our political processes, are disengaging from political participation.").

II. PUBLIC SCHOOL ADMINISTRATORS SHOULD NOT BE PERMITTED TO RESTRICT STUDENT SPEECH RELATING TO DRUG POLICY SIMPLY BECAUSE THEY HAVE A DIFFERENT VIEWPOINT.

Petitioners contend that school administrators should have the authority to restrict and punish any student speech that an administrator might "reasonably glean[ ]

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drug testing 'degrading' and said it would make her reluctant to participate in extracurricular activities[.]").

[23] *See* Chris DeBenedetti, *Student Addresses Legislators*, The Oakland Tribune, April 20, 2004, at More Local News (" 'I'll always vividly remember it,' Gelender said of her testimony. 'It's so rare to have a high school student testify in front of the state [Legislature]. Just being in Sacramento and in the Capitol Building was really, really exciting.' "); *see also* Zach Wierzenski, *Student Drug Testing Is Not the Answer*, The Virginian-Pilot, July 2, 2005, at B9 (editorial by an SSDP high school member who organized a coalition of parents and other students in opposition to a county drug-testing initiative).

. . . expresse[s] a positive sentiment about" a controlled substance. Brief for Petitioners, filed Jan. 16, 2007 ("Pet'r's Br.") at 25. But the authority they seek has virtually no limit and would allow school officials to punish students for engaging in undeniably political speech that may conflict with the views or opinions of the school administrators. This subjective standard would plainly lead to the divergent treatment of identical speech, and the overbroad prohibition of core political speech.

A. The Medicinal Marijuana Debate Exemplifies The Fatal Flaws In Petitioners' Proposed Standard.

During the past decade, perhaps the most prominent and hotly-debated drug policy issue has been the question whether seriously ill patients should be permitted to use marijuana for medicinal purposes. This scientific and political debate provides a clear picture of why Petitioners' proposed standard cannot stand constitutional muster. Since California passed its medicinal marijuana initiative in 1996, this Court has heard two medicinal marijuana-related cases, and at least ten states have passed laws similar to California's.[24] Students have as much interest in discussing these initiatives and court cases as anyone else, especially where, for example, they have a family member with cancer. Based on medical studies, these students may believe that marijuana provides an effective treatment for their family member's health condition. And having an opportunity to discuss the policy issues with friends and classmates in a

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[24] *See Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001); Alaska Stat. Ann. §§ 11.71.090, 17.37.010 to 17.37.080 (2007); Colo. Const. art. XVIII, § 14; Colo. Rev. Stat. § 18-18-406.3 (2006); Haw. Rev. Stat. Ann. §§ 329-121 to 329-128 (2006); Me. Rev. Stat. Ann. tit. 22, § 2383-B5 (2006); Mont. Code Ann. §§ 50-46-102 to 207 (2006); Nev. Const. art. IV, § 38; Or. Rev. Stat. §§ 475.300 to 475.346 (2006); R.I. Gen. Laws §§ 21-28.6-1 to .6-11 (2007); Vt. Stat. Ann. tit. 18, § 4471 (2006); Wash. Rev. Code §§ 69.51A.005 to 69.51A.902 (2007).

constructive environment, such as at school, may help them cope with the internal turmoil they encounter when dealing with an ill loved one.

Yet, Petitioners' proposed approach would permit administrators to punish any and all student speech that relates to the medicinal marijuana debate. Speech supporting medicinal marijuana laws or initiatives, almost by definition, "expresse[s] a positive sentiment about marijuana use" – namely, that marijuana use may sustain the health of individuals who suffer from cancer, AIDS, multiple sclerosis, or other debilitating illnesses. Leading up to the 2006 elections, for example, a public high school in South Dakota confiscated T-shirts in support of a South Dakota medicinal marijuana ballot initiative from two students for this very reason.[25] The shirts featured the message "Vote Yes on Initiated Measure 4" along with an image of a marijuana leaf. *Id.* The principal claimed that the inclusion of the leaf on the shirt violated school policy. One of the students contended that the picture on the shirt "should be protected as political speech" and argued that "he was campaigning for a ballot issue, not promoting the use of an illegal drug." *Id.* The principal responded that that was "absurd, . . . I'm not even going to dignify that argument with a response." *Id.* Although the principal there said that he would permit the wording on the shirt without the offending image, Petitioners' proposal in this case would not make even that concession: any speech that might be interpreted by a school administrator as expressing a positive sentiment about marijuana use could be banned from public schools.

The impact of Petitioners' approach would not be limited to statements in favor of medicinal marijuana initiatives. Petitioners claim that school administrators should be able to punish any student speech that an administrator might "reasonably glean" expresses a

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[25] *See S.D. School Confiscates Teens' Medical Marijuana T-Shirts*, The Associated Press, Nov. 11, 2006.

positive sentiment about a controlled substance. Pet'r's Br. at 25. That authority would encompass nearly any speech that relates to drug abuse or drug policy. *Id.* at 25 (arguing that such statements are "directly contrary to the school's basic educational mission of promoting a healthy, drug-free lifestyle").

It is not uncommon for government officials and advocates of zero-tolerance policies to mischaracterize legitimate policy arguments as attempts to encourage or promote drug use. For example, in 2004, SSDP submitted an FOIA request and accompanying fee waiver application for statistical information about the number of students who had been denied financial aid due to a drug conviction. On September 20, 2005, the Department of Education denied the fee waiver, stating that it cannot "conclude . . . that SSDP has no commercial interest in the disclosure sought" because SSDP's "campaign could directly benefit those who would profit from the deregulation or legalization of drugs . . . ."[26] On January 26, 2006, SSDP filed a lawsuit against the Department of Education, which the Department quickly settled prior to responding to the Complaint by agreeing to provide the information sought without charge.[27] Similarly, government officials often argue that reform policies themselves should not be enacted because they would send the "wrong message" to kids and encourage drug use.[28] In

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[26] *Students for Sensible Drug Policy v. United States Dep't of Educ.*, Case No. 1:06-CV-00140-EGS (D.D.C. 2006), Complaint ¶ 17, *available at* http://www.dcd.uscourts.gov/court-records.html.

[27] *Harmful Drug Law Hits Home: How Many College Students in Each State Lost Financial Aid Due to Drug Convictions?*, Students for Sensible Drug Policy, April 17, 2006, at 8, *available at* http://www.ssdp.org/states/ssdp-state-report.pdf.

[28] *See, e.g.*, Elvia Diaz, *Hopefuls Decry Medical Marijuana*, The Arizona Republic, Oct. 10, 2002, at 4B (reporting that U.S. drug czar John Walters said medicinal marijuana initiatives were "sending the wrong message to young people"); Jacob Sullum, *That Chemo Cachet: Medical Marijuana and Kids*, Reason Magazine, Jan. 2006, *available at* http://www.reason.com/news/printer/33056.html/ (reporting that ONDCP

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this atmosphere – where the Department of Education implies SSDP's campaign to repeal a law denying financial aid to students who are trying to recover from drug abuse means the organization is financially entangled with "those who would profit from . . . the legalization of drugs" (*i.e.*, drug dealers) – it is difficult to imagine any drug policy speech that school administrators would not be able to suppress under Petitioners' proposed standard.

B. Petitioners' Proposal Cannot Withstand Constitutional Scrutiny, As Evidenced By Past Cases.

The recent Second Circuit case *Guiles v. Marineau* provides an especially instructive example of how Petitioners' "reasonably glean" approach would allow a school official to punish legitimate political speech simply for containing an ambiguous reference to a controlled substance. *See Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006). There, a student wore a T-shirt criticizing President Bush. It read "George W. Bush, Chicken-Hawk-in-Chief" and featured an image of President Bush's face along with various other images, including three lines of cocaine and a martini glass. *Id.* at 322. School officials claimed the shirt violated its dress policy based on "the images of the drugs and alcohol and the word 'cocaine . . . .'" *Id.* at 323. The district court held for the school district, finding that the images were "plainly offensive or inappropriate," but the Second Circuit reversed. Petitioners criticized *Guiles* in their reply memorandum in support of their *certiorari* petition, asserting that *Guiles* "adopt[ed] the Ninth Circuit's destabilizing approach." Petitioner's Reply Memorandum, filed Oct. 9, 2006, at 5. Tellingly, their opening merits brief was nearly silent on *Guiles*. Indeed, far from demonstrating fault in the Ninth Circuit's decision, *Guiles* reveals the dangerousness of the

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said the California medicinal marijuana initiative sent "the wrong message to our children").

approach Petitioners advance. Petitioners' standard would create a drug exception to student speech whereby a student could be punished for any ambiguous image of, or reference to, a controlled substance, even an image or reference that is unquestionably political and possibly "anti-drug." *See Guiles*, 461 F.3d at 329 (finding that the students' shirt appeared to relate an anti-drug message).[29]

Granting school administrators the power to punish students anytime their speech could possibly be interpreted as expressing a positive sentiment about a controlled substance would mean that a policy area intimately affecting them would be off-limits to free debate. Under Petitioners' view, the more an issue impacts students, the less the Constitution protects a student's right to freely speak about it. This is not, and should not be, the law, particularly in light of the significant interests students have in discussing and debating approaches to solving the problem of drug abuse. *See supra* at 4-11; *see also Tinker*, 393 U.S. at 511 ("[S]tudents may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to

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[29] Petitioners' *amicus* the United States argues that a school should be allowed to suppress a banner like Mr. Frederick's "even if [it] were somehow understood to advocate legalization of marijuana[.]" Brief for United States as *Amicus Curiae* Supporting Petitioners, filed Jan. 16, 2007, at 27. Yet, whether marijuana should or should not be legalized is a political question that should be as open to legitimate debate among students as any other political issue. *See Shanley*, 462 F.2d at 972 (noting that "the general subject[ ] of marijuana [is a] . . . widely-publicized, widely-discussed, and significant issue"). This is especially true in Alaska, where, as the court below noted, Alaska court decisions and "repeated referenda about whether, and to what extent, to criminalize or legalize marijuana" make the issue of marijuana legalization particularly salient. *Frederick v. Morse*, 439 F.3d 1114, 1118 n.4 (9th Cir. 2006); *see also id.* at 1122 n.44 ("By [Petitioners'] standard, distributing photocopies of the Alaska Supreme Court decision [that] declared that there is 'no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of marijuana,' would also undermine the school's anti-drug mission.").

the expression of those sentiments that are officially approved."). This Court should not accept Petitioners' invitation to create a drug exception to students' First Amendment rights. *See Hatter*, 452 F.2d at 675 (courts should not "distinguish between issues and . . . select for constitutional protection only those which [they] feel[ ] are of sufficient social importance").

C. Petitioners' Proposed Approach Would Prevent Students From Freely Discussing Their Own School's Drug Policies.

Petitioners contend that schools should be able to prohibit student speech about drugs or drug policy that – in their view – is "inconsistent with the mission of schools to promote healthy lifestyles (including seeking at every turn to combat substance abuse)." Pet'r's Br. at 28. Such authority would permit school officials to punish a wide range of political speech. *See Frederick*, 439 F.3d at 1120 ("All sorts of missions are undermined by legitimate and protected speech . . . a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing that [there is] less heart disease among moderate drinkers and teetotalers . . . .").

If a school can punish students for speech that is inconsistent with the school's mission or policies, students will not be able to openly discuss their own school's drug-testing policies, even if that discussion could benefit the effectiveness of the program. Student drug testing at schools is another heavily-debated drug policy issue in this country and has been the subject of two cases before this Court in the last twelve years. *See Bd. of Educ. of Indep. Sch. Dist. No. 9 v. Earls*, 536 U.S. 822 (2002) (holding that suspicionless drug testing of students who participate in extracurricular activities is constitutional); *Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding that student athletes had a decreased expectation of privacy and that suspicionless drug testing of such students is constitutional). The issue has become even more prominent following President Bush's 2004 State of the

Union Address, in which he highlighted random student drug testing as a key part of his national drug control strategy.[30] The Office of National Drug Control Policy has held drug-testing summits in cities across the country to promote student drug testing and to "engage local communities in a productive dialogue about the dangers of youth substance use and the efficacy of developing and implementing random student drug-testing programs."[31]

Petitioners' proposal also could result in school administrators' preventing students from forming clubs or groups that provide a forum to discuss drug policy issues. Indeed, at least one school has already attempted to rely on this rationale to stop the formation of an SSDP chapter. In autumn 2006, Devon Defazio, a high school junior at a public school in Clearwater, Florida, attempted to start an SSDP chapter because of his interest in the student drug-testing issue. The school's principal, however, refused to approve the chapter, contending it would be inconsistent with the school's zero-tolerance drug policies. The principal took this position despite the fact that one of SSDP's primary concerns is the adverse impact that drug abuse has on our communities.[32] After months of discussion, including repeated phone calls and emails from SSDP's Executive Director to the principal assuring him that SSDP does not endorse drug use, the principal finally relented and allowed Mr. Defazio to start his group. If Petitioners' broad standard is adopted, however, high school principals

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[30] *See* Jim Wrinn, *Catawba Ponders Student Drug Test: County Schools Battle Teen Use, Officials Have Many Questions, Are Yet to Determine Who Would be Tested and How*, Charlotte Observer, Feb. 8, 2004, at 1V (noting that drug testing had become an issue of "local and national interest since President Bush, in his State of the Union address last month, called on Congress to expand funding for school drug testing from $2 million to $23 million").

[31] *White House Office of National Drug Control Policy to Host Random Student Drug-Testing Summits*, State News Service, Jan. 23, 2007.

[32] *See Mission and Values Statements*, Students for Sensible Drug Policy, http://www.ssdp.org/about/.

seemingly would be free to ban students from forming school clubs or groups to discuss drug policy issues, anytime the principal believes the discussions would be "inconsistent with" the school's anti-drug mission or the policies that implement that mission. School administrators should not be allowed to stifle legitimate student speech with which they personally disagree under the guise of claiming that it is inconsistent with the school's policies. *See Healy v. James*, 408 U.S. 169, 187 (1972) (holding that college president's "mere disagreement . . . with [a student] group's philosophy affords no reason to deny it recognition"); *Shanley*, 462 F.2d at 972 ("Perhaps newer educational theories have become in vogue since our day, but our recollection of the learning process is that the purpose of education is to spread, not to stifle, ideas and views.").

D. Having Broad Authority To Suppress Student Speech Relating To Drug Policy Will Not Help Schools Prevent Drug Abuse.

Amici D.A.R.E. argue that a drug exception to student free speech is warranted because it is necessary to prevent drug abuse. *See* D.A.R.E. *Amici* Br. at 12-17. D.A.R.E. goes so far as to claim that if the Ninth Circuit's ruling is allowed to stand, it would "threaten[ ] to make vital anti-drug policies unenforceable." *Id.* at 4. Although D.A.R.E. is correct that schools and parents can help reduce student drug abuse by "expos[ing students] to drug or alcohol prevention messages," *see id.* at 11, they offer no evidence to support their striking claim that silencing students on the important issues of drug policy and drug abuse is necessary, or even helpful, to combat the drug abuse problem. In fact, just the opposite is true: open discussion about drug policy and drug abuse gives students the opportunity to learn more about the issues and to make informed decisions.

Nor is there evidence to support D.A.R.E.'s more modest assertion that programs promoting hard-line zero-tolerance messages to students are themselves "vital"

drug policies. Indeed, recent government studies have shown that the two largest such programs fail to reduce drug use among young people. A United States General Accounting Office examination of six long-term studies of the D.A.R.E. program revealed that there were "no significant differences in illegal drug use between students who received DARE . . . and students who did not . . . ."[33] Similarly, a study funded by the National Institute on Drug Abuse found that the federal anti-drug advertising campaign was not effective in reducing drug use among young people. Specifically, the study revealed "little evidence of direct favorable campaign effects on youth" and found that the campaign's effects on "social norms and perceptions of other kids' use of marijuana . . . were consistently in an *unfavorable direction*, i.e., higher exposure [to the campaign] leading to weaker anti-drug norms. [Emphasis added.]"[34]

Ultimately, there is very little support for D.A.R.E.'s claim that suppressing student speech is necessary to enforce vital anti-drug policies. Indeed, the policy arguments advanced by D.A.R.E. do not justify taking the highly unusual step of treating student speech that mentions drugs differently from other student speech under the First Amendment.

III. PUNISHING RESPONDENT'S SPEECH WOULD STIFLE LEGITIMATE STUDENT SPEECH ABOUT DRUG POLICY.

Whether under Petitioners' proposed standard or one that is less restrictive, permitting Petitioners to punish

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[33] Marjorie E. Kanof, et al., *Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs*, U.S. General Accounting Office Report, Jan. 15, 2003, at 2, *available at* http://www.gao.gov/new.items/d03172r.pdf.

[34] Robert Orwin, et al., *Evaluation of the National Youth Anti-Drug Media Campaign: 2004 Report of Findings*, Westat, June 2006, at xv, *available at* http://www.nida.nih.gov/DESPR/Westat/NSPY2004Report/Vol1/Report.pdf.

Respondent based on his vague and nonsensical statement would chill legitimate debate in public schools about drug policy. Respondent's speech neither directly nor even necessarily advocated drug use. Indeed, his uncontroverted testimony is that he did not intend to encourage or support drug use. The most natural understanding of Respondent's statement is exactly what he said it was: a nonsensical absurdity designed to garner attention. *See Frederick*, 439 F.3d at 1116 (noting that Mr. Frederick described the words on the banner as "just nonsense" that was "designed to be meaningless and funny, in order to get on television"). Even viewed in the worst light, it is difficult to discern much more from the phrase "BONG HITS 4 JESUS" than an immature distraction. Indeed, the phrase could more easily be interpreted as an attempt at a sarcastic criticism of religion than as an endorsement of drug use. Respondent's ambiguous phrase is a far cry from student speech that directly "advocates breaking the law[.]" D.A.R.E. *Amici* Br. at 14. Given what Respondent actually said, punishing speech such as his under any standard, in the absence of an actual disruption of school activities or a statement that clearly advocates the use of illegal drugs, would improperly stifle student speech about drug policy.

If school administrators are allowed to punish a nonsensical statement simply because it mentions a controlled substance (or a term associated with a controlled substance) and an administrator claims it is "pro-drug," it will be impossible for students to know what speech falls on what side of the line. Students who want to discuss medicinal marijuana, mandatory minimum drug sentences, random drug testing of student athletes, or other drug policy reform ideas would be in constant fear of punishment, concerned that an administrator might wrongly interpret their speech as being in favor of breaking the law. *Williams v. Spencer*, cited by Petitioners, nicely illustrates the difference between speech that amounts to a direct, unambiguous endorsement of illegal activity, and the phrase on Respondent's banner. *See Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980). In

Williams, the Fourth Circuit held that a school could prohibit distribution of an independent student newspaper that contained a paid advertisement for illegal drug paraphernalia. *Id.* at 1203. In reaching its decision, the court emphasized that the speech at issue was an unambiguous endorsement of drug use and "quite different from . . . a school prohibit[ing] the distribution of a publication containing an article of some literary value that may examine drugs and drug use. The printed material in issue here was paid for by a store seeking to profit from its encouragement of the use of drugs." *Id.* at 1206.

The distinction drawn in *Williams* is important to consider in deciding this case. So long as the student speech at issue may have some literary value or other similar value, such as political commentary, schools should not be permitted to punish that speech simply because it may also be interpreted as expressing a vague and nonsensical positive sentiment about drug use. Punishing students for clear and unambiguous statements that encourage their fellow students to engage in illegal activity does not pose the danger to important political speech that punishing Respondent's speech does, because it would require more than just an administrator's reasonable belief. By contrast, a legal standard that permits schools to punish students for statements that could be reasonably interpreted as political, nonsensical, or pro-drug has no limits. For such speech, *Tinker* provides more than adequate discretion for schools to punish speech that crosses the line from a nonsensical joke or satirical political statement into a material disruption of the educational environment or a clear endorsement of illegal activity. *See Tinker*, 393 U.S. at 513 (holding that schools may punish speech "in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts class work or involves substantial disorder or invasion of the rights of others").

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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